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(27,307)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 552.

THE STANDARD FASHION COMPANY, PETITIONER,

vs.

MAGRANE HOUSTON COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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a United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1343.

THE STANDARD FASHION COMPANY, Plaintiff, Appellant,

v.

MAGRANE HOUSTON COMPANY, Defendant, Appellee.

Appeal from the District Court of the United States for the District of Massachusetts from Final Decree (Johnson, J.), March 13, 1918.

TRANSCRIPT OF RECORD.

Herbert Noble, James B. Sheehan, Robert G. Dodge, Storey, Thorndike, Palmer & Dodge, for Appellant.
James W. Sullivan, for Appellee.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1343.

THE STANDARD FASHION COMPANY, Plaintiff, Appellant,

v.

MAGRANE HOUSTON COMPANY, Defendant, Appellee.

Transcript of Record of District Court.

No. 815, Equity Docket.

THE STANDARD FASHION COMPANY, Plaintiff,

v.

MAGRANE HOUSTON COMPANY, Defendant.

The bill of complaint in this cause was filed in the clerk's office on the twenty-fifth day of July, A. D. 1917, and was duly entered at the June Term of this court, A. D. 1917, and is in the words and figures following:

Bill of Complaint.

[Filed July 25, 1917.]

1. The plaintiff is a corporation duly organized under the laws of the State of New York and is a citizen and resident of said State. The defendant is a corporation duly organized under the laws of the State of Massachusetts and is a citizen and resident of said State. The matter *is* controversy, as hereinafter set forth, exceeds exclusive of interest and costs the sum or value of $3,000.

2 2. The plaintiff is engaged in the business of manufacturing and selling patterns for all kinds of garments worn by women and children and in publishing periodicals and catalogues illustrating said patterns and containing pictures, plates, numbers and general descriptions thereof, all of which have a large and extensive sale and valuable reputation in the country at large and have been long on the market in the City of Boston, Massachusetts, and its vicinity. The handling, managing and sale of said patterns requires skill, knowledge of the trade and specially a leading position in the business of selling the dry-goods which are used in the manufacture of garments for which said patterns are made.

3. The defendant has for many years been engaged in the dry-goods business, so-called, in said Boston, having a large retail store at the corner of Washington Street and Temple Place in said city, where it has long conducted a successful business and for more than two years has maintained a special agency for the sale of the plaintiff's patterns as hereinafter more fully set forth. The defendant has become specially experienced in and has special facilities for the sale of such patterns and the distribution of periodicals and catalogues illustrating and describing the same.

4. On or about the twenty-fifth day of November, 1914, the plaintiff and the defendant entered into a contract, a copy of which is hereto annexed marked "A", whereby the plaintiff, among other things, granted to the defendant an agency for the sale of its patterns at the defendant's store aforesaid for a term of two years from the date of the contract and from term to term thereafter until the contract should be terminated in the manner therein provided, and the plaintiff agreed to supply the defendant with said patterns and certain advertising matter relating thereto and to exchange unsold patterns and at the termination of the agency to take back and credit all unsold patterns remaining on hand, all as more fully set forth in said contract; and among other things the defendant agreed to keep on hand a certain stock of the plaintiff's patterns, except during periods of exchange, in an amount of not less than $1,000, to permit the plaintiff to take account of said pattern stock whenever it desires, to pay proper attention to the
3 sale of said patterns, to conserve the best interests of the agency at all times, to re-order promptly all patterns as sold,

to give the department a prominent position on the ground floor in its store and to return to the plaintiff all patterns on hand at the termination of the contract; and the defendant expressly agreed not to sell or permit to be sold on its premises during the term of the contract any other make of patterns than those of the plaintiff. On the same day on which the said contract was executed and in accordance with its terms and requirements, the defendant signed a so-called detailed order, of which a copy is hereto annexed marked "B".

5. Thereafter the parties duly entered upon the performance of the said contract. The plaintiff supplied the defendant with patterns, advertising matter, periodicals, cabinets and signs with which to establish its pattern department and the defendant located said department on the ground floor of said store and proceeded with the performance of the conditions of the agreement on its part to be performed and established a very considerable trade in the patterns of the plaintiff, which was of great value to the plaintiff.

6. At the expiration of the original term of two years provided for in said contract neither party gave notice of the termination of the same, and the said contract, therefore, in accordance with its provisions was extended for a further term of two years and will continue in force until the expiration of three months after the end of said further term, to wit, until February 25, 1919.

7. The plaintiff has duly performed all the conditions of the said contract upon its part to be performed and has been at all times and is now ready, willing and able to perform the same until the expiration of the term of said contract and has so informed the defendant.

8. The defendant performed the conditions of said contract on its part to be performed until the ninth day of July, 1917, on or about which date it without right ceased to sell or to make efforts to sell the plaintiff's patterns, abolished the department for the conducting of such sales and installed in place thereof a department for the sale of the patterns of The McCall Company, one of the
4 plaintiff's competitors in business; and since said date the defendant has not performed any of the conditions of said contract on its part to be performed, but, on the contrary, has sold and permitted to be sold on the premises described in said contract a make of patterns other than those of the plaintiff, to wit, the McCall patterns, manufactured by the said The McCall Company; and the defendant has not paid proper attention to the sale of Standard patterns, but, on the contrary, has paid attention to the sale of said McCall patterns, and the defendant has not conserved the best interests of the agency for Standard patterns, but, on the contrary, has conserved the best interests of The McCall Company, plaintiff's competitor, by the sale of said McCall patterns and by the distribution of large quantities of McCall fashion sheets and has diverted the trade in the plaintiff's patterns among the defendant's customers to the said The McCall Company. The plaintiff has duly demanded of the defendant that it withdraw the said McCall patterns from sale on its said premises and that it proceed with the performance

of the said contract, but the defendant has failed and refused so to do; and the plaintiff is informed and believes and therefore alleges that unless restrained by order of this court the defendant intends to continue the sale of said McCall patterns and to continue the aforesaid breaches of said contract.

9. The said contract was entered into by the plaintiff, as the defendant well knew, with the object of securing to the plaintiff the great advantage which would accrue to it from having its patterns sold exclusively in the store of the defendant on account of the defendant's peculiar fitness and special advantages for the sale of such goods and to obtain for the plaintiff the prestige and renown that would accrue to it from the exclusive sale of its patterns in the said store of the defendant. The purpose of said contract, although in form it provides for the sale of patterns by the plaintiff to the defendant, is in fact to sell the plaintiff's patterns to the public through the defendant and not to sell said patterns to the defendant, as all patterns which are not sold by the defendant to the public must be returned by the defendant to the plaintiff; and all of the provisions of the said contract have for their object the increase in the number of patterns sold or to be sold through the defendant to the public and the decrease in the number of patterns to be returned by the defendant to the plaintiff. It is essential to the successful management in any store of a department for the sale of patterns that the agent shall handle the patterns of only one manufacturer and that competing patterns shall not be sold in the same store, and it has been established by experience and is well recognized in the trade that the sale of competing patterns in the same store results in loss to all parties concerned and is a disadvantage to the public.

10. The store of the defendant mentioned in said contract is located in the center of the retail dry goods district in the City of Boston. Within a radius of seven hundred and fifty feet from the defendant's said store are located three other agencies for the sale of the patterns of the plaintiff's said competitor The McCall Company, while within said radius the plaintiff has but one agency for the sale of its patterns; and within said radius all of plaintiff's competitors have one or more agencies for the sale of their patterns. In the entire metropolitan district of Boston, including the city proper and its suburbs, the plaintiff has but five agencies for the sale of its patterns, while in the same district its competitors have over one hundred such agencies. The plaintiff has for thirty years conducted the sale of its patterns to the public through agencies established under contracts identical or similar in form to that between the plaintiff and the defendant, and said contracts have not lessened competition or tended to create a monopoly in the pattern business; and the said contract between the plaintiff and the defendant and the performance of the terms thereof have had and will have no tendency to lessen competition or to create such a monopoly.

11. If the defendant be suffered to continue to violate the said contract, the plaintiff will suffer irreparable injury in its business and

in the reputation of its goods and particularly in the diversion to its competitor The McCall Company of a large amount of trade to which it is rightfully entitled and which has already been established.

6 There is no other store in the retail dry goods district of Boston where the plaintiff can establish an agency as valuable to it as the agency which it is entitled to have in the defendant's store under the said contract. It is impossible to estimate in money the amount of damages suffered by the plaintiff by virtue of the defendant's breach of contract as aforesaid and the plaintiff therefore has no adequate remedy at law.

Wherefore the plaintiff prays:

1. That the defendant and its agents and servants may be enjoined temporarily until hearing and permanently thereafter during the term of said contract and until February 25, 1919, from advertising, selling or distributing the patterns, periodicals, catalogues and other literature or printed matter of the said The McCall Company or any pattern manufacturer other than the plaintiff, and from using its store, business, agents, clerks, apparatus or connections to further or advance the interests of the said The McCall Company or any other pattern manufacturer than the plaintiff and from permitting to be sold at its said store during the term of said contract and until the aforesaid date any make of patterns other than those of the plaintiff.

2. That the plaintiff may be awarded such damages as may be ascertainable.

3. That the plaintiff may have such further or other relief as the nature of the case may require.

ROBERT G. DODGE,
HERBERT NOBLE,
New York;
JAMES B. SHEEHAN,
New York,
Solicitors for the Plaintiff.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Walter H. Marsh, being duly sworn, deposes and says that he resides in Hudson, New Hampshire, and is manager of the Boston office of the Standard Fashion Company, the above-named plaintiff,

7 and is familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WALTER H. MARSH.

Subscribed and sworn to before me this twenty-fifth day of July, 1917.

HAROLD S. DAVIS,
Justice of the Peace.

[MEMO.—Copy of contract, marked "A" and detailed order, marked "B" are here omitted, as they later appear of record as Exhibits 7 and 8.]

At the same term, to wit, August 14, 1917, the following Answer was filed:

Answer.

[Filed August 14, 1917.]

Answer of the Defendant, Magrane Houston Company, to the Plaintiff's Bill of Complaint Herein.

1. The defendant has no certain knowledge that the plaintiff is a corporation duly organized under the laws of the State of New York and is a citizen and resident of said State, and requires the plaintiff to prove the same. The defendant admits it is a corporation duly organized under the laws of the State of Massachusetts and is a citizen and resident thereof. The defendant denies that the matter in controversy exceeds the sum or value of $3,000.

2. The defendant admits all the allegations of paragraph 2 of the plaintiff's bill of complaint except the allegation "all of which have a large and extensive sale and valuable reputation in the country", as to which allegation the defendant says it has no definite knowledge and requires the plaintiff to prove the same if material.

3. The defendant admits the allegation of paragraph 3 relative to its conducting a business, except the allegation that it had maintained a special agency for the sale of the plaintiff's patterns, as to which allegation it says the contract hereinafter referred to is decisive. The defendant denies the allegation that it has be-
8 come specially experienced in or has special facilities for the sale and distribution of patterns and catalogues.

4. The defendant admits that it entered into a contract, a copy of which is annexed to the plaintiff's bill of complaint and marked "A", and says further that it admits the other allegations of paragraph 4 so far as they are repetitions of what is contained in said contract, and denies them so far as they are not declaratory of the terms of said contract.

5. The defendant denies that it established a very considerable trade in the patterns of the plaintiff, which were of great value to the plaintiff, and admits all the other allegations of paragraph 5 of the plaintiff's bill.

6. The defendant denies the allegations of paragraph 6 of the plaintiff's bill.

7. The defendant denies the allegations of paragraph 7 of the plaintiff's bill.

8. The defendant admits the allegations of paragraph 8 of the plaintiff's bill, except that its action was without right and except that its action will constitute a breach of contract if continued.

9. The defendant denies all the allegations of paragraph 9 of the plaintiff's bill.

10. The defendant admits the allegation as to the location of its store contained in paragraph 10 of the plaintiff's bill. As to the succeeding allegations relative to the location and number of agencies of the plaintiff and its competitors, the defendant has no accurate knowledge, and requires the plaintiff to prove the same if material. The defendant denies all the succeeding allegations of paragraph 10 of the plaintiff's bill.

11. The defendant denies all the allegations of paragraph 11 of the plaintiff's bill, except the allegation relative to the impossibility of estimating alleged damages suffered by the plaintiff, and as to this allegation says that if the plaintiff had suffered damages the same could be estimated, but the plaintiff has not suffered any damage by reason of any wrongful conduct of this defendant.

12. And further answering the defendant says that the plaintiff and the defendant, at the time of their entering into the con-
9 tract, a copy of which is annexed to the plaintiff's bill herein, understood and construed the said contract as a contract for the term of two years from its date, and for such longer time as either party should fail to give notice of a desire to terminate the same; that at the time of the entering into the said contract the plaintiff had no other agency for the sale of its product among the immediate competitors of the defendant; that early in the year 1917 the plaintiff installed its product and opened an agency in the store of the R. H. White Company, a direct competitor of the defendant whose store is but a short distance from the defendant's, which agency the plaintiff still maintains.

And the defendant says that thereafter, to wit, on April 7, 1917, it gave the plaintiff notice in writing that it had decided to terminate the sale of the plaintiff's product in its store, a copy of which notice is as follows:

"April 7, 1917.

The Standard Fashion Co., Van Dam Street, New York, N. Y.

GENTLEMEN:

The Magrane Houston Co. of Boston, Mass., hereby notify you that they have decided to terminate the sale of your Standard Fashion Patterns in their store in three (3) months from the above date,

which is in conformity with the contract entered into between your company and the Magrane Houston Company, dated November 25, 1914.

Yours very truly,

____ ____,
President."

PBM/MHM.

That thereafter the defendant continued to do all things required of it by its contract with the plaintiff until the time provided for in said notice had expired, to wit, on July 9, 1917, when in accordance with said notice it ceased to do business with the plaintiff. The defendant further says that no irreparable injury or damages of any sort will ensue to the plaintiff by reason of the defendant discontinuing the sale of the plaintiff's product, and that the plaintiff's product can be obtained as easily and conveniently now in the same neighborhood with the defendant as before the defendant discontinued its sale of the plaintiff's goods.

And the defendant further says that neither it nor its officers intended to enter into any contract requiring any definite term beyond two years for its performance, and that the construction of the said contract set out in paragraph 6 of the plaintiff's bill is a forced and unusual construction thereof and that the said contract should be construed as binding the defendant for two years and from time to time thereafter until notice of its termination was given. The defendant further says that the plaintiff is a combination in restraint of trade, and that it is seeking an injunction against the defendant for the purpose of preventing competition and to establishing monopoly.

The defendant further says that the contract herein sued upon is not one of any great value to the plaintiff, and whatever damage the plaintiff has or will suffer from any breach of it which it may be able to prove will be amply and adequately compensated for by the payment of money damages to the plaintiff, and that the plaintiff by reason of its opening another agency in competition with the defendant, and because of the fact that its aim in securing an injunction is not to enforce a contract with the defendant, but to prevent competition by injuring a competitor of the plaintiff's, is not entitled to equitable relief, but has a plain, adequate and complete remedy at law.

MAGRANE HOUSTON COMPANY,
By JAMES W. SULLIVAN,
Its Attorney.

This cause was thence continued to the September Term, A. D. 1917, when on the twenty-seventh and twenty-eight days of November said cause came on to be heard on the pleadings and evidence and was fully heard by the court, the Honorable Charles F. Johnson, Circuit Judge, duly assigned to hold said District Court, sitting.

This cause was thence continued under advisement to the present

December Term, A. D. 1917, when, to wit, March 9, 1918, an opinion of the court is announced.

On the thirteenth day of March, A. D. 1918, the following Final Decree is entered:

11 *Final Decree.*

March 13, 1918.

JOHNSON, *J.*:

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, namely: That the bill of complaint herein may be dismissed with costs to the defendant in the sum of $52.88.

By the Court.

JOHN E. GILMAN, JR.,
Deputy Clerk.

From the foregoing final decree the plaintiff claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and bond being waived said appeal is allowed accordingly.

Opinion of the Court.

March 9, 1918.

JOHNSON, *J.*:

November 25, 1914, the plaintiff entered into a contract with the defendant, containing among others the following provisions:

"The first party hereof grants to second party an agency for the sale of Standard patterns for their store in the City of Boston, State of Massachusetts, for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided, and agreed to sell and deliver f. o. b. New York or at its branch office in Boston, Mass., to second party, Standard patterns, at a discount of fifty percent from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party at regular agents' rates; to allow second party to return discarded patterns semi-annually between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost, for other patterns to be shipped at the time of return or thereafter; but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct, and must be delivered in good order to first party at its general office in New York.

12 In consideration of the above the second party agreed to purchase a certain number of standard fashion sheets and handy catalogues per annum and to pay transportation charges on

same, and on all goods ordered or returned, and to purchase and keep on hand at all times, except during periods of exchange, one thousand dollars ($1,000) value in Standard patterns, at the net invoice prices, and to pay first party for the first order of pattern stock five hundred dollars ($500) thirty (30) days after shipment of the same, it being agreed that the balance of the purchase price, five hundred dollars ($500), should remain unpaid as a standing credit during the continuance of the agreement and become due and payable at its termination, upon which sum the second party agreed to pay interest at the rate of three per cent (3%) per annum on January 15th of each year, and to pay for all other purchases on or before the fifteenth day of the month succeeding the date of shipment.

The second party also agreed:

"not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell Standard patterns except at label prices."

The contract contained this provision in regard to its termination:

"Either party desirous of terminating this agreement must give the other party three months' notice in writing within thirty days after the expiration of any contract period, as above specified, the agency to continue regularly during such three months."

No notice of its desire to terminate the contract was given by the defendant to the plaintiff within thirty days after the expiration of the first period of two years after date of the contract; but on April 7, 1917, it gave to the plaintiff notice in writing of its decision to terminate the sale of Standard patterns in three months from the date of the notice, and about the first of July, 1917, discontinued the sale of the Standard patterns and placed on sale in its store patterns made by The McCall Company.

13 In its bill the plaintiff prays that the defendant may be enjoined until February 25, 1919, the earliest date at which it claims the contract can be terminated,—

"from advertising, selling or distributing the patterns, periodicals, catalogues and other literature or printed matter of said McCall Company or any pattern manufacturer other than the plaintiff, and from using its store, business, agents, clerks, parties or connections to further advance the interests of the said McCall Company or any other pattern manufacturer other than the plaintiff, and from permitting to be sold at said store during the term of said contract, and until the aforesaid date, any make of patterns other than those of the plaintiff."

The plaintiff also asks to be awarded "such damages as may be ascertainable."

The defendant claims:

1. That the contract was terminated on July 7, 1917, by the notice given by it on April 7, 1917.

2. That the contract is one for sale and that, because it contains the negative covenant

"not to sell or permit to be sold on the premises of second party during the term of the contract any other make of patterns."

it is in violation of Act, October 15, 1914, Chapter 323, Section 3, 38 St. 731, known as the Clayton Act.

I find that the defendant did not give notice of its desire to terminate the contract in accordance with its provisions, and that it would continue in force until terminated as therein provided, unless it can be successfully attacked by the defendant as unlawful under Section 3 of the Clayton Act, which is as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof
14 shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

If an agency only were created by the contract in question it is clear that the provisions of this act would not apply, because by its terms it is made applicable only to leases, sales or contracts for sale. Although the plaintiff, by the terms of the contract, grants to the defendant and agency for the sale of Standard patterns, the court will search beneath the language employed to discover the real nature of the contract and will place its own construction upon it without reference to its characterization by the parties themselves.

The plaintiff in fact agreed to sell and deliver to the defendant

"Standard patterns at a discount of fifty per cent from retail prices and advertising matter at the prices and on the conditions named * * * also such other publications as may be issued by first party at regular agents' rates."

All transportation charges and expenses of sale were to be paid by the defendant. No accounting by the defendant to the plaintiff was required. While the defendant had the right to return discarded patterns between January 15th and February 15th, and between July 15th and August 15th in each year, and could receive in exchange nine-tenths of their cost in other patterns, there is nothing in the contract to compel it to make the exchange, and patterns which are re-

turned for exchange must have been purchased by the second party from the first party direct.

One-half the contract price to be paid for the first order of patterns was entered upon the books of the plaintiff company as an obligation which the defendant was to pay at the termination of the contract, and upon which it agreed to pay interest yearly. No condition was to be performed by the defendant before the title to the patterns delivered would vest in it, and the fact that the defendant could return discarded or unsold patterns in no way prevented the title to the patterns from vesting absolutely in the defendant. While the defendant agreed to return unsold patterns at the termi-
15 nation of the contract, yet this right of return was evidently inserted for its benefit rather than to insure the return of patterns to the plaintiff, for the contract provides:

"That neglect to return the pattern stock within two weeks after expiration of three months' notice shall relieve first party from all obligation to redeem the same."

That it was the intent and understanding of the parties to the contract that this return of unsold patterns constituted a repurchase by the plaintiff, plainly appears from the typewritten section which appears upon the back of the contract, by which it is provided that in case the premises of the defendant company or a substantial part of the same should be sold, the defendant company should have the privilege of terminating the contract, and "may" then deliver its stock of patterns to the plaintiff "for repurchase under the repurchase clause of this contract."

It will be noted that the defendant is not compelled by this provision to return its unsold stock, but that it "may deliver" the same to the plaintiff " for repurchase." The purchase of the whole contract is plainly to sell patterns at a reduced rate to the defendant on the condition that it will resell at the retail prices fixed by the plaintiff, and also refrain from selling the goods of any other pattern manufacturer. The credit extended for one-half the purchase price of the original order for patterns is intended to serve the purpose of holding the defendant to its contract.

The reports of the judiciary committees of the House of Representatives and the Senate accompanying the Clayton Act were introduced in evidence for the purpose of showing that it was not the intent of Congress to include "exclusive agencies" within the scope of the act. They contain this statement relative to the purpose of the act:

"It not only does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatsoever relates to agencies, properly so termed."

It will be noticed that the committees were very careful to state that only "agencies, properly so termed," are excluded from the provisions of the act.

16 I do not think the contract establishes an agency, "properly so termed," although it is made to assume this aspect in some of its features, but that it is a contract for sale; and in this view I find support in the recent opinion of the Supreme Court in Straus et al. v. Victor Talking Machine Company, 243 U. S. 490, and of Circuit Judge Knappen in Ford Motor Co. v. Union Motor Sales Co. et al., 244 Fed. 156.

Counsel for the plaintiff relies upon Wilcox & Gibbs Co. v. Ewing, 141 U. S. 627, as decisive of the question whether the contract was one of agency or one for sale; but admitting under the authority of this case that the defendant was created an agent for certain purposes. It is also nevertheless true that the contract contained an agreement for an absolute sale of patterns and the plaintiff's publications to the defendant as its agent.

If the contract is one for sale, is it unlawful under the Clayton Act because its effect

"may be to substantially lessen competition or tend to create a monopoly?"

Neither the Supreme Court nor any other court of last resort has yet passed upon Section 3 of the Clayton Act.

The cases from State courts that have been cited by the plaintiff were all decided before the passage of the Clayton Act and all dealt with the construction of a State statute, and therefore afford no assistance in the construction of a statute which is declared to be supplemental to the Sherman Act, after a construction had been placed by the Supreme Court upon that act by which the restraint of trade prohibited by it was declared to be an unreasonable restraint.

In the Great Atlantic & Pacific Tea Company v. Cream of Wheat Company, 227 Fed. 46, the court had under consideration Section 2 of the Clayton Act, which deals with discriminations between different purchasers in the sales of commodities and makes such discriminations unlawful

"where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

17 The last clause of the section, however, provides:—

"That nothing herein contained shall prevent persons engaged in selling goods * * * from selecting their own customers in bona fide transactions and not in restraint of trade."

The court there held that it was not unlawful for the Cream of Wheat Company to refuse to sell its product to retailers and confine its sales exclusively to wholesalers; and held that

"Neither the Sherman Act nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular."

and found it unnecessary to go into a consideration of the Clayton Act, which was discussed by District Judge Hough when the case was before him, and whose opinion in 224 Fed. 566 is cited upon the brief of counsel for the plaintiff.

In Motion Picture Patents Company v. Universal Film Manufacturing Company 235 Fed. 398, it was claimed in the Circuit Court that the contract there under consideration was unlawful because in violation of Section 3 of the Clayton Act; and Judge Hand said:

"If the prohibitions of the Clayton Act mean anything at all this case falls within them and the restrictions as to the use of films other than complainants' with the projecting machines are therefore void.

"Indeed the report of the Judiciary Committee of the House concerning the Clayton Act shows that its purpose is to reach the film monopoly."

When the case reached the Supreme Court, however, it was decided upon other grounds, the court stating its conclusion as follows (243 U. S., 502, 517):—

"Our conclusion renders it unnecessary to make the application of this Statute to the case at Bar which the Circuit Court of Appeals made of it; but it must be accepted by us as a most persuasive expression of the policy of our country with respect to the question before us."

In the dissenting opinion of Mr. Justice Holmes he also "leaves on one side the question of the effect of the Clayton Act."

In Coca Cola Company v. J. G. Butler & Sons, 229 Fed.
18 224, Judge Trieber found that the refusal of the Coca Cola Company to sell its syrup for bottling to other than its licensed bottlers and permit such parties to use its trademark in connection with the bottled product was not a violation of the Clayton Act, in view of the possibility of adulteration and the hardship to the manufacturer in maintaining such supervision over the bottling as it deemed necessary if required to sell to every intending purchaser.

In Pictorial Review Company v. Curtis Publishing Company, decided June 23, 1917, Judge Hand found that the Curtis Publishing Company had established a system for the promotion of the sale of its publications by forming a "league of Curtis salesmen," and that a restriction in its contract with district agents or wholesalers of the defendant's publications that they should not sell to the Curtis newsboys publications other than those of the defendant without first obtaining the defendant's approval, was not in violation of the Clayton Act; but his decision was placed upon the ground that the league of newsboys had been formed by the Curtis Company through its "ingenuity, labor and capital," and that the complainant was attempting to secure a preliminary injunction in order that it might avail itself of the plaintiff's system for the sale of its own publication, and that in making this attempt the complainant is itself engaging in unfair trade. He intimates in the following language, however, what his opinion might be if nothing but a sale were involved:—

"If nothing but a sale were involved, I might support plaintiff's contention that defendant has violated the Clayton Act by preventing these wholesale dealers from selling the Pictorial Review through sub-dealers and boys."

In United States v. United Shoe Machinery Company, 234 Fed. 127, 150, District Judge Trieber, after having quoted part of the opinion of the Supreme Court in the Standard Oil Company case, discusses the Clayton Act as follows:—

"On the other hand, the Act now under consideration, instead of using the generic words of the Sherman Act, in plain and unequivocal language states what acts shall be unlawful, if they 'substantially lessen competition or tend to create a monopoly.'
19 This being the case the presumption is, not that Congress intended that the construction of the Sherman Act should control, but, on the contrary, that it should not control. Had Congress intended that the construction placed upon the Sherman Anti-Trust Act in those cases should apply to the Clayton Act, it would have used the same or like generic words, instead of defining what acts shall be unlawful, if the natural result of such acts tends to substantially lessen competition or create a monopoly in any line of commerce." * * *

"Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do those acts, which may put it in his power to do so."

The Clayton Act is entitled: "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes."

The report of the Senate committee of the judiciary upon the bill contains the following statement of its purposes:

"Broadly stated the bill in its treatment of unlawful restraints and monopolies seeks to prohibit and make unlawful certain trade practices, which as a rule singly and in themselves are not covered by the Act of July 2, 1890, or other existing Anti-Trust Acts; and thus by making these practices illegal, to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation."

While the Clayton Act reaffirms the general terms of the Sherman Act as construed by the United States Supreme Court in the Standard Oil Company and American Tobacco Company cases, it goes further and deals in specific terms with certain acts and practices which are declared by it to be unlawful if their effect may be "to substantially lessen competition or tend to create a monopoly."

The court is not to inquire into the wisdom of such legislation, and in Standard Manufacturing Company v. United States, 226 U. S. 20, 49, its duty is clearly stated by Mr. Justice McKenna:

"The law is its own measure of right and wrong, and what it permits or forbids and the judgment of the courts cannot be set up

against it in a supposed accommodation of its policy with the good intentions of parties, and it may be of some good results."

20 I am satisfied with the reasoning of Judge Trieber that Congress, with the full knowledge of the construction which had been placed upon the Sherman Act by the Supreme Court, did not intend that the same construction should be placed upon the specific terms of the Clayton Act; for it chose to define the lessening of competition which it declared to be unlawful, and to do this used the word "substantially" to make it apparent that a real, as opposed to an imaginary or fanciful lessening of competition, was intended.

Doubtless a substantial lessening of competition would amount to an unreasonable restraint of trade; but I do not think it is the duty of the court to find this before it can pronounce a contract unlawful, the effect of which it has found may be to "substantially lessen competition." The reports of the committees of both houses of Congress, as well as the legislative history of the bill, show the intent of Congress to protect the public from practices which it believed to be inimical to the public good by preventing these practices from being put in operation.

I think, therefore, it is the duty of the court to determine whether or not the contract has provided means for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means.

By the use of the word "may" the intent is manifest to deal with the potential evil which a contract may contain, and to make the attempt to substantially lessen competition unlawful.

The contract must be considered as part of a widely extended system and a conclusion reached as to the legality of the system. There are in the United States and Canada about fifty-two thousand (52,000) so-called pattern agencies, and of these the plaintiff and two other companies allied with it through a common holding company control about twenty thousand (20,000), with all of whom a contract like the one we are considering is in force.

The contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers: a large retail dry goods store at the corner of Temple Place and Washington Street, in the centre of the dry goods district of a large city.

21 The plaintiff has made a contract containing a like negative covenant with R. H. White Company, whose store is nearly opposite the defendant's store upon Washington Street, both of which stores the plaintiff claims are very desirable locations for the sale of its patterns, because goods are sold there from the piece for the manufacture of women's and children's clothing by use of patterns.

If the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry goods stores in this district, it would have a complete monopoly of the sale of patterns in it, and there is nothing in the contract to prevent it doing this, or even covering the whole State of Massachusetts or the whole country. If there were but one dry goods store in a village and the plaintiff

could make this contract with the proprietor of that store, it would secure a practical monopoly of the pattern business in that village.

I am of the opinion that the negative covenant in the contract is prohibited by the Clayton Act, and therefore that the bill should be dismissed with costs to the defendant.

A decree in accordance with the above may be submitted.

Plaintiff's Petition for Appeal.

[Filed March 13, 1918.]

The above-named plaintiff, Standard Fashion Company, conceiving itself aggrieved by the final decree of this court entered on March 13, 1918, in the above-entitled proceeding, does hereby appeal from said decree to the United States Circuit Court of Appeals for the First Circuit, and it prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals for the First Circuit.

STANDARD FASHION COMPANY,
By STOREY, THORNDIKE, PALMER & DODGE,
Its Attorneys.

22 Boston, March 13, 1918.

And now, to wit, on March 13, 1918, it is ordered that the appeal be allowed as prayed for.

CHARLES F. JOHNSON,
U. S. Circuit Judge.

Bond on appeal waived.

MAGRANE HOUSTON COMPANY,
By JAMES W. SULLIVAN,
Its Attorney.

Plaintiff's Assignment of Errors.

[Filed March 13, 1918.]

Now comes the above-named plaintiff, Standard Fashion Company, and makes and files with its petition for appeal from the final decree in this cause the following assignment of errors:

1. The court erred in ruling that the plaintiff's bill should be dismissed.

2. The court erred in ruling that the negative covenant in the contract which the plaintiff by this bill seeks to enforce is prohibited by the Clayton Act.

3. The court erred in finding and ruling that "the purpose of the whole contract is plainly to sell patterns at a reduced rate to the defendant on the condition that it will resell at the retail prices fixed

by the plaintiff, and also refrain from selling the goods of any other pattern manufacturer".

4. The court erred in finding and ruling that "the credit extended for one-half the purchase price of the original order for patterns is intended to serve the purpose of holding the defendant to its contract".

5. The court erred in ruling that the contract did not establish an agency properly so termed.

6. The court erred in ruling that even if the defendant was created by the contract an agent for certain purposes, nevertheless as the contract contained an agreement for an absolute sale of patterns and publications to the defendant as the plaintiff's agent the contract should be treated as one of sale.

7. The court erred in ruling that the cases from State courts
23 dealing with State anti-monopoly statutes afford no assistance in construing the Clayton Act.

8. The court erred in ruling that Congress did not intend that the same construction should be placed upon the terms of the Clayton Act as had been placed by the Supreme Court upon the similar terms of the Sherman Act.

9. The court erred in ruling that "it is the duty of the court to determine whether or not the contract has provided means of a real or substantial lessening of competition, irrespective of what use has been or is being made of these means".

10. The court erred in ruling that the contract in question must be considered as part of a widely extended system and a conclusion reached as to the legality of the system.

11. The court erred in finding and ruling that the contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers.

STANDARD FASHION COMPANY,
By Its Attorneys,
STOREY, THORNDIKE, PALMER & DODGE.

Stipulation as to Use of Exhibits.

[Filed March 13, 1918.]

It is hereby agreed that the original exhibits may be used at the arguments in the Circuit Court of Appeals and may be submitted to the court.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for Plaintiff.

JAMES W. SULLIVAN,
Attorney for Defendant.

24 *Stipulation as to Record.*

[Filed March 13, 1918.]

It is agreed that the testimony to be included in the transcript of record shall be reproduced in the exact words of the witnesses.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for Plaintiff.

JAMES W. SULLIVAN,
Attorney for Defendant.

March 13, 1918.

JOHNSON, *J.*:

Ordered the testimony to be included in transcript of record may be reproduced in the exact words of the witnesses, pursuant to stipulation.

Attest:
JOHN E. GILMAN, JR.,
Deputy Clerk.

Præcipe.

[Filed March 13, 1918.]

Bill of complaint.
Answer.
Opinion of Johnson, J.
Final decree.
Petition for appeal and waiver of bond.
Assignment of errors.
Testimony.
Exhibits 6 to 13 inclusive and 17.
Stipulation as to exhibits.
Stipulation as to record.

R. G. DODGE,
For Plaintiff.

Assented to.
J. W. SULLIVAN,
For Defendant.

25 *Testimony.*

Johnson, J.

Appearances:

Messrs. Storey, Thorndike, Palmer & Dodge (Robert G. Dodge, Esq.), and Herbert Noble and James B. Sheehan, Esquires (of the New York Bar), Counsel for Plaintiff:
James W. Sullivan, Esq., Counsel for Defendant.

Evidence for Plaintiff.

Boston, Mass., November 27, 1917.

Mr. Dodge: If your Honor please, at the outset, may I present Mr. Herbert Noble and Mr. James B. Sheehan, of the New York Bar, counsel for the Standard Fashion Company, who are here to assist in the trial of the case?

Opening Statement by Robert G. Dodge, Esq., in Behalf of the Plaintiff.

The plaintiff is the Standard Fashion Company of New York. The defendant is the Magrane Houston Company, proprietors of a dry goods store in the city of Boston. The plaintiff is a manufacturer of patterns,—patterns for women's garments. The defendant, a dry goods store, had an agency contract with the plaintiff, which we say it has broken without justification. The contract was entered into as of November 25, 1914, and was to extend for successive terms of two years each until properly terminated. It could be terminated only at the end of some contract, or term of two years. Without proper notice the defendant threw out our patterns, and installed those of a competitor.

The Court: Was it necessary to renew the contract at the end of the two years?

Mr. Dodge: No, sir. The contract automatically renewed itself, unless notice was given within thirty days after the expiration of some contract term.

Now, what we seek by this bill in equity is, primarily, to restrain the breach of the covenant in the contract whereby the defendant agreed not to handle the patterns of any other maker That
26 is a common provision in pattern contracts, and we seek an injunction against the breach by the defendant of that negative covenant. We ask also for such damages as may be ascertainable.

The case is in most respects identical with the Massachusetts Supreme Court case of Butterick Publishing Company v. Fisher, 203 Mass. 122, the only difference being that, since the decision of the Fisher case by the State Supreme Court, the Clayton Act has been passed by Congress, and it is claimed, presumably, in this case—it is a claim that we have met frequently—that these contracts of ours are in violation of Section 3 of the Clayton Act. We are very much interested in getting a decision from this court, if we are entitled to it, as we think we are, that our contract is valid under the Clayton Act.

Now, with that preliminary statement, I will read the bill, which sets out the facts pretty completely.

[The bill of complaint is read by Mr. Dodge.]

Before reading the contract I will read the defendant's answer.

[The defendant's answer is read by Mr. Dodge.]

The pleadings seem to present, therefore, three main issues,—First, one of construction of the contract, as to the time when it could be terminated.

Secondly, the effect of the installation of an agency by the plaintiff with the R. H. White Company during the pendency of the defendant's contract. And

Third, the issue of prevention of competition and establishing of a monopoly, which we assume is Section 3 of the Clayton Act.

Now, the contract is short, and I will read it. It is on the printed form which, as will appear, is in use with perhaps 6,000 agencies of the Standard Fashion Company in this country; and on reading it your Honor will observe that it does establish what is an agency. While the title of the patterns passes to the agents, it is only a qualified title that the agent gets, because every pattern that he does not sell comes back to the Standard Fashion Company at a very large percentage of its original cost. The only object of the contract is to get the patterns into the hands of the ultimate consumer:

27 *"Mutual Agreement between the Standard Fashion Company, of New York, First Party, and Magrane Houston Co., of Boston, State of Mass., Second Party.*

First party hereby grants to second party an Agency for the sale of Standard Patterns for their store in the City of Boston, State of Mass., for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided,"—

and I will pass down now at once to the provision on that subject which occurs later on.

The Court: Read that again, please.

Mr. Dodge: The agency is granted.

"for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided."

The later provision is:—

"Either party desirous of terminating this agreement, must give the other party three months' notice in writing, within thirty days after the expiration of any contract period as above specified,"

which we construe, of course, as meaning after the expiration of any term of two years as above provided:

"and agrees to sell and deliver F. O. B. New York, or at its Branch office in Boston, Mass., to second party, * * * [etc., reading the contract]. It is hereby acknowledged by both parties that there

are no verbal understandings between them conflicting with this contract."

The conditions on the back I need not read at the present time. It gives the rates at which the advertising matter is to be taken

Now, there is nothing in the contract with reference to the Magrane Houston Company's having an exclusive agency. There is no agreement on the part of the Standard Fashion Company not to establish any other agency; and indeed it will appear in evidence that at the time when this contract was made the Standard Fashion Company's patterns were being sold at another store in Boston very near the Magrane Houston Company's store.

The contract is dated November 25, 1914, and the two years
28 expired November 25, 1916. Up to the expiration of thirty days after November 25, 1916, no notice had been received and it was not until some time in the spring of 1917 that the defendant undertook to give notice of the termination of the contract. We say that the contract automatically became extended until November 25, 1918, and could not be determined, under its provisions, until three months after November 25, 1918, that is, until February 25, 1919. So that when the defendant, on July 7th of this year, abolished its department for the sale of our patterns and installed the McCall Company's patterns, there were 19 2-3 months of the contract period for which we were entitled to have the agency continue.

There is just one other point that perhaps I should call attention to in opening now, and that is on this question of the impossibility of determining damages. A minimum amount of damages can be estimated, because of course we can show the profits that we made from this agency during the two years and more that it continued, which I take it would be admissible in evidence as to the profit we should have made if it had been allowed to continue. But there are other, perhaps more important, features of the damage which cannot possibly be estimated. The agent has to buy these sheets and other advertising matter from us at a certain low price, and has to distribute them free, and that is one of the important functions that he performs. Women coming into the store to buy goods get these fashion sheets and take them home, and may or may not buy the patterns ultimately at the Magrane Houston Company store. The distribution by the agent in a large city like Boston of the fashion sheet and other advertising matter leads to trade in the patterns which may appear in various other stores, and we cannot determine how much business we lose through the Magrane Houston Company's failure and refusal to deliver any more of our advertising material. More important than that is the serious damage to the plaintiff company's good-will through the fact that the defendant not merely ceased to represent us, but that it installed the patterns of our competitor and business rival, the McCall Company. It becomes advertised everywhere about
that the Magrane Houston Company store has thrown out the
29 Standard patterns and put in the McCall. The Standard trade, which ought to come to us, is diverted to the McCall Company, and our reputation and business are very seriously inter-

fered with. Damages for that cannot be estimated in dollars and cents. In the Fisher case, in the Supreme Court of Massachusetts, the court said that it is impossible to determine the damages in this case for various reasons.

Now, that case differed from the present one in this respect only, that there the agency had not even begun, and therefore there was no part of the damage that could be determined. Mr. Fisher had a contract, but he broke it before the time for beginning its performance came; that is, he repudiated it, and there was no experience upon which he could estimate any part of the damage. Here we have more than two years' actual experience with this agency.

Mr. Scanlon and Mr. Marsh, will you be sworn?

Mr. Sullivan: May I ask your Honor to suspend just a moment while I go to the other court room? My client possibly is there. He went to get a contract at the store, and he has not come back.

The Court: We will suspend for a few moments.

[Recess of ten minutes.]

Mr. Dodge: Here are the pleadings, your Honor. A copy of the contract is annexed to the bill [passing document to the Court].

JOHN T. SCANLON (sworn):

Mr. Dodge: Before proceeding with Mr. Scanlon, may I read Section 3 of the Clayton Act? I meant to read that before.

The Court: It has been read a good many times, but I have forgotten it.

Mr. Dodge: It is the Act of October 15, 1914:

"Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

We say two things at least in regard to that here,—first, that our contract is an agency contract and not an outright sale, and therefore does not come within the section at all; and, second, that if our contract is to be treated as a contract of sale, it is plainly not a contract of sale the effect of which is to substantially lessen competition or tend to create a monopoly.

It does appear in the House and Senate reports covering the Clay-

ton bill, which I take it are admissible upon the question of construction—it does appear in both of those reports that this section was not designed to reach agency contracts. Here is the report in the House of Representatives:

"It has been contended very earnestly that its provisions prevent exclusive or sole agencies. It not only does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatever relates to agencies properly so termed."

The Court: Are you reading from some remarks of a senator?

Mr. Dodge: No, sir; not from a debate. This is a committee report. I understood that the reports of committees to the houses of Congress are admissible in aid of construction of legislation, although debates in House or Senate might not be. The Senate report is in the same language.

(By Mr. Dodge:)

Q. 1. Mr. Scanlon, what is your full name?

A. John T. Scanlon.

Q. 2. And you are president of the Standard Fashion Company?

A. I am.

Q. 3. You live in New York?

A. New York.

Q. 4. How long have you been president of the company?

A. Since 1906; eleven years.

31 Q. 5. And before that time were you in the employ of the company?

A. I was general manager of the company from 1900, I should think.

Q. 6. Before that what were you?

A. I was in the employ of another pattern manufacturing concern.

Q. 7. How long have you been in the pattern business?

A. Twenty-eight years.

Q. 8. Is the Standard Fashion Company a New York corporation?

A. It is.

Mr. Dodge: I offer the certificate of incorporation.

[The certificate of incorporation of the Standard Fashion Company, dated May 13, 1887, is marked "814 Eq., Pl'ff's Ex. 1, J. E. G., Jr., Dep. Clk., 11/27/17".]

Q. 9. What is the business of the Standard Fashion Company?

A. The business is the publishing of fashions periodically and the manufacture and sale of patterns.

Q. 10. Where does it manufacture?

A. In New York; do you mean the particular address?

Q. 11. Oh, no.

A. Yes, in New York. The whole establishment is in New York City.

Q. 12. And where does it print its advertising material?

A. In New York also.

Q. 13. That advertising material consists of regular periodical publications?

A. Yes, several; chiefly, that is, the one of the biggest edition, a monthly fashion sheet, which is distributed through agencies, and to some extent direct. That has a circulation of about two millions or a little more a month.

Q. 14. Those are the fashion sheets?

A. Those are the fashion sheets; yes.

Q. 15. Is that a sample copy [passing a publication to the witness]?

A. That is one of our fashion sheets; yes, sir.

Q. 16. One of the monthly publications?

A. That is a monthly publication.

Mr. Dodge: I will offer that.

[The publication entitled "Standard Fashions" is marked "815 Eq., Pl'ff's Ex. 2, J. E. G., Jr., Dep. Clk., 11/27/17".]

32 Q. 17. Now, apart from your monthly advertising publication, what other such publications have you?

A. We also publish what we call the "Standard Quarterly," a standard journal of considerable size, which is published four times a year, and which has a circulation of something like 250,000 an issue.

Q. 18. That also is devoted very largely to advertising your patterns?

A. That is devoted pretty much altogether to an illustration and description of our patterns and styles. There is, of course, some fashion editorial matter in it which bears on the same subject.

Mr. Dodge: I offer this.

[The "Standard Quarterly" is marked "815 Eq., Pl'ff's Ex. 3, J. E. G., Jr., Dep. Clk., 11/27/17".]

Q. 19. And is there anything besides those two?

A. Well, we publish a monthly magazine of general interest to women, called "The Designer." It is a household magazine, dealing with subjects of general feminine interest, and it is also devoted to a certain extent to fashions.

Q. 20. Is that one of your means of advertising your patterns?

A. It is one of them, but in a lesser degree.

Q. 21. Does it figure at all in the agency contracts?

A. Not at all.

Q. 22. Then we will pass that by. Is there any other form of publication which is used in advertising your patterns?

A. Yes; we have the Standard Fashion Catalogue, a semi-annual catalogue.

Q. 23. This is a copy of the semi-annual catalogue, is it?

A. Yes. That is revised and published semi-annually, and kept up to date by monthly supplements, that is, there are supplements published monthly, which, added to it, keep it up to date in the matter of Standard fashions.

Mr. Dodge: I offer this Standard Fashion Catalogue as Exhibit 4.
[The Standard Fashion Catalogue is marked "815 Eq., Pl'ff's Ex. 4, J. E. G., Jr., Dep. Clk., 11/27/17".]

Q. 24. Now, the patterns that are made by your company reach the ultimate consumer how? How are they marketed?

A. The distribution is made pretty much altogether
33 through agencies. Of course we do considerable direct business also, but our plan of business is to establish agencies everywhere, as depots to which our customers may go to get patterns, the patterns they select from our magazines, principally the fashion sheet. They identify the pattern which strikes their fancy in connection with the number which is given to each illustration, and they go to these agencies to make their purchases of these Standard patterns.

Q. 25. How many agencies have you?

A. About six thousand.

Q. 26. In the United States?

A. No; I should say that that would include Canada, too. There may be about 6,200. That includes Canada.

Q. 27. And are they all acting under contracts in the same general form as the one in the case at bar?

A. Our contracts with these merchants are uniform as to form, that is, as to terms. The number of fashion sheets furnished, and the distribution of stock, differs in different localities.

Q. 28. In what kind of stores is it most advantageous to place the agency?

A. In dry goods stores, where piece goods and fabrics of that kind are sold; those make the most desirable agencies, where the customers can buy the goods for the garments that are made with the aid of our patterns.

Q. 29. Why is that the best kind of a store for your agency?

A. Well, it seems natural enough that where a woman goes to buy her materials, if she can at the same place buy the patterns, the combination is a good one it encourages the use of the patterns. It seems to me a natural enough situation.

Q. 30. Perhaps you have stated it, but I will ask you, so as to be sure, how your publications advertising the patterns are distributed? How do they get into the hands of the public?

A. Largely through our agencies. To some extent through direct circulation.

Q. 31. Do the agents sell them or give them away?

A. The fashion sheets they give away. They are required, as a contract matter, to distribute them free. They buy them from us at the price stipulated in the contract, and the contract provides
34 that they are to distribute them free to the customers. That is the fashion sheet, you understand.

Q. 32. Yes. How are the others circulated?

A. The Quarterly, the Standard Quarterly, is sold through agencies or direct. The price is twenty-five cents. Every agency handles the Quarterly, and has a very considerable sale of it.

Q. 33. How about the semi-annual publication?

A. The semi-annual publication has a circulation of sixty to eighty thousand an issue. I think that that is used largely by dressmakers and other large users of patterns, who want it for display to their customers, perhaps.

Q. 34. I think you gave the circulation of The Designer and of the monthly sheets?

A. The Designer has a circulation of about 350,000 to 400,000, somewhere along there; the fashion sheets has a circulation of something over 2,000,000 a month; about 2,000,000 a month.

Q. 35. What is your output of patterns?

A. Our output of patterns is something upwards of a million a month.

Q. 36. Is the pattern what you might call a perishable article?

A. I should say that a pattern is a peculiarly perishable article. It is a diagram for the construction of a garment that is in style, and there is no desire for the use of a pattern for an article unless it is in style. Where the style is not current there is no sale at all for the pattern.

Q. 37. Let me ask you how many kinds of styles a complete set of patterns handled by one agent comprises?

A. Our catalogue illustrates every style that we call current, and there are about 1,200 in one book, I think.

Q. 38. Should every agent carry at least one pattern for every style?

A. Well, you understand—it should be understood—that each pattern that represents a given style is made and cut in different sizes so that women of different measurements, and children of different measurements, can get a precise fit.

Q. 39. How many different sizes are there?

A. Oh, it would average, I should say, seven.

Q. 40. Seven sizes of each of 1,200 styles?

35 A. Yes. Some styles, maybe, are in five or six sizes only; some in seven and eight, and some more.

Q. 41. And does every agent have to carry a complete set?

A. No. We try to regulate that with the closest possible reference to the business of the particular agency. In that great bulk of smaller agencies they carry only two sizes of each style, unless it is an extreme style, and they don't carry that at all.

Q. 42. But practically all the styles?

A. We have practically all the styles carried so that the purchasers can select the pattern of any style that we publish.

Q. 43. Do styles change very quickly?

A. Yes, some styles do. Some styles are staple. Underwear and that sort of thing sometimes remains for some time without change. The outer garments change very quickly, however.

Q. 44. How many patterns do you get out a month, on an average?

A. On an average, sixty or sixty-one; something like that.

Q. 45. Different styles?

A. Different styles.

Q. 46. When patterns are returned to you as being out of style, have they any value?

A. Yes; simply as waste paper.

Q. 47. Simply as waste paper. You do send them, I believe, to a concern that makes paper to be re-made?

A. All of our old patterns are bought and used by the makers of our patterns, I believe, who repulp them in some way.

Q. 48. The pattern is sold under the name of Standard Patterns?

A. Standard Patterns.

Q. 49. And how long have the patterns been sold under that name?

A. Since 1887; thirty years.

Q. 50. Sold in all parts of this country?

A. Yes.

Q. 51. And in Canada?

A. And in Canada.

Q. 52. And is the pattern invariably known under that name, Standard?

A. That is the only name under which it has ever been known,—Standard Pattern.

Q. 53. Is the name Standard Pattern a valuable asset?

A. I should say that that was a very valuable asset.

Q. 54. Are the patterns all numbered so that a person may order them by reference to the designs in the advertising sheets?

36 A. The patterns are invariably ordered by number, identified by number.

Q. 55. And is that a sample pattern [passing a paper package to the witness]?

A. That is one of our Standard Patterns.

Q. 56. And is it a fact that you always have a picture of the completed garment on the outside?

A. Always.

Q. 57. And indications as to the numbers of the different parts of the pattern that are inside?

A. We give a diagram of the different parts of the pattern—an outline diagram.

Q. 58. And of course these patterns when sold by any agent are sold as Standard Patterns?

A. Yes.

Q. 59. And not as the agent's patterns?

A. No; they are never identified in any way with an agent; they are known as Standard Patterns, and sold as such.

Mr. Dodge. I offer that Standard Pattern.

[The Standard Pattern referred to is marked "815 Eq. Pl'ff's Ex. 5, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 60. How long has the Standard Fashion Company done business in Boston?

A. Well, to my knowledge, for twenty-eight years. I suppose it has done business for thirty years, since it was established, probably.

Q. And has it at different times had different agencies in Boston?

A. It has; yes, it has been variously represented in the matter of agencies.

Q. 62. And any agency that you have had in Boston has, of course, received the goods by shipment from the factory in New York?

A. All of our goods are manufactured in New York for distribution to the different establishments.

Q. 63. And shipped from there to the different agencies?

A. Yes, sir.

Q. 64. You are familiar with the fact that a contract was made at a certain time with the Magrane Houston Company?

A. Yes; I was acquainted with all the details of the matter.

Q. 65. And at that time, November 25, 1914, were the Standard Patterns being sold elsewhere in Boston?

A. Oh, yes.

Q. 66. Where were they being sold at that time?

37 A. We had a little sales room on Washington Street, and we also had an agency in the Houghton & Dutton store.

Q. 67. The sales room on Washington Street was where?

A. I really don't recall the number. In the block between Jordan & Marsh's and White's,—in that block, on that side of the street.

Q. 68. Was that Grosberg's store?

A. Yes, Grosberg was the party who let the store.

The Court: You said an agency in the Houghton & Dutton store, and a sales room in the other place?

The Witness: An agency at Houghton & Dutton's, and a sales room at this little Grosberg store.

The Court: Did you have an agency at the Grosberg store?

The Witness: No; we conducted that ourselves.

Q. 69. Was the matter of the establishment of relations between yourselves and the Magrane Houston Company opened up by you or by them?

A. We received a letter from them asking us to advise them of our agency terms, with the view to making an agency arrangement.

Q. 70. And is that the letter [passing a paper to the witness]?

A. Yes, that is the original application, dated October 14, 1914.

Q. 71. And a copy of your reply is annexed to it?

A. That is my reply; yes.

Mr. Dodge: I suppose that you have the original of our reply of October 22d, 1914?

Mr. Sullivan: We don't seem to.

Mr. Dodge: Then I will offer the carbon copy.

Mr. Sullivan: All right.

The Court: Do you object to the use of a copy?

Mr. Sullivan: No, sir.

Mr. Dodge: They may be marked as one exhibit. They are fastened together. The letter from the Magrane Houston Company of October 14, 1914, is as follows:

"Oct. 14, 1914.

The Standard Pattern Co., New York.

GENTLEMEN:

We are led to believe that our agency with the Ladies' Home Journal pattern expires within a short time and as we desire to
38 make new connections, will you kindly let us know if you are interested in making a proposition to us and oblige,

Yours very truly,

MAGRANE HOUSTON CO.
CHARLES H. WILSON."

And the reply is dated October 22d, 1914:

"October 22nd, 1914.

Magrane Houston Company, Washington Street & Temple Place. Boston, Mass.

GENTLEMEN:

Replying to your Mr. Wilson's letter of October 14th, I write to say, let me hear from you when the termination of your present pattern arrangement is fixed, and, I shall then be pleased to take up the matter with you.

Respectfully, —— ——."

[The letter from Magrane Houston Company to the Standard Pattern Company, dated October 14, 1914, attached to which is a carbon copy of letter from the Standard Pattern Company to Magrane Houston Company, dated October 22d, 1914, is marked "815 Eq., Pl'ff's Ex. 6, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 72. You thereafter had no direct dealings with the Magrane Houston Company yourself?

A. No. Negotiations resulted from that which were conducted for us by our Mr. Robert Kelly.

Q. 73. That was handled through your representatives under your directions, but not by you personally?

A. Yes.

Q. 74. Is this the original contract as executed by both parties [passing a paper to the witness]?

A. That is the original contract.

Q. 75. And is that the detailed order that accompanied it [passing another paper to the witness]?

A. That is the original detailed order also. I was looking for that identification stamp.

Q. 76. Yes. Does the detailed order add anything to the contract, except that it specifies the number of publications per month that shall be taken to make up the gross amount named in the contract; that is, it distributes the advertising matter which the agent agrees to take among the different months,—that is about all there is to it, isn't it?

A. That expresses the purpose of it. The main contract states the yearly quantities and the detailed order puts it on the
39 monthly quantities basis, arranged properly as to seasons.

Mr. Dodge: I offer the contract and the detailed order.

[The contract between the Standard Fashion Company and the Magrane Houston Company dated November 25th, 1914, is marked "815 Eq., Pl'ff's Ex. 7, J. E. G., Jr., Dep. Clk., 11/27/17", and the detailed order from the Magrane Houston Company to the Standard Fashion Company dated November 25th, 1914, is marked "815 Eq., Pl'ff's Ex. 8, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 77. After the contract was made did you proceed with the performance of it?

A. We did.

Q. 78. Did you deliver the patterns and other matter called for by the contract, as called for by it?

A. We did.

Q. 79. Perform the contract in all respects?

A. Yes.

Q. 80. Did the contract prove profitable?

A. It did.

Q. 81. Did you get any notice of termination of the contract at any time within thirty days after the expiration of the first two-year period?

A. No.

Q. 82. At some time in the spring of 1917 did you get a notice that the defendant desired to terminate the contract?

A. Yes. We received a letter from him. I made a memorandum from the original record, if you will permit me to refresh my memory about it, that I think mentions the date.

Q. 83. Well, I think I have the letters here. Is that [passing a paper to the witness] the first intimation which you received of any intention on the part of the defendant, or any desire on the part of the defendant, to terminate the contract?

A. That is the first intimation—that is the first letter or advice we received from them of their intention to terminate the contract.

Mr. Dodge: That is the letter of March 21, 1917, Mr. Sullivan. It reads:

"The Standard Fashion Co., 12 Vandam St., New York, N. Y.

GENTLEMEN:

Inasmuch as we have been advised you have decided to do business with the R. H. White Co., such information being confirmed by your Mr. Marsh today, we would respectfully ask that you discontinue
40 with us at the earliest possible date. Under our contract with you it is stated we are to give you three months' notice, we prefer, however, to discontinue by the time of the next issue. A prompt reply will greatly oblige,

Yours very truly,

MAGRANE HOUSTON COMPANY,
By C. A. HANLEY.

P. S.—As requested by Mr. Marsh, we are sending a copy of this letter to him."

[The letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 9, J. E. G., Jr., Dep. Clk., 11/27/17".]

Mr. Sullivan: Here is the reply [passing a paper to Mr. Dodge].

Mr. Dodge: The reply, which I now have, is dated March 23d, 1917:

"Messrs. Magrane Houston Company, Washington Street & Temple Place, Boston, Mass.

GENTLEMEN:

We duly received yours of the 21st, requesting an immediate release from contract obligations, because of arrangements we have made for selling our goods to the R. H. White Company.

We respectfully decline to accede to your request, and in our opinion, there is nothing in the situation which justifies your making it.

As your letter seems to disclose a belief that our agreement with you can be terminated by three months' notice at any time, it is perhaps desirable that we should advise you that such is not the case, and that you are under engagement to handle our goods for the next two years.

Yours very truly,

STANDARD FASHION COMPANY.
J. BREWIS."

[The letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 10, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 84. Was that letter of April 7, 1917, which I now hand you, the next communication you got from them [passing a paper to the witness]?

A. This is the next communication relating to that matter; yes, sir.

Mr. Dodge: The letter of April 7, 1917, I offer:

41 "The Standard Fashion Co., Van Dam St., New York, N. Y.

GENTLEMEN:

The Magrane Houston Co. of Boston, Mass., hereby notify you that they have decided to terminate the sale of your Standard Fashion Patterns in their store in three (3) months from the above date, which is in conformity with the contract entered into between your company and the Magrane Houston Company, dated November 25, 1914.

Very truly yours,

P. B. MAGRANE,
President.

[The letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 11, J. E. G., Jr., Dep. Clk., 11/27/17."]

I offer the reply of April 11th, 1917, from the Standard Fashion Company to the Magrane Houston Company:

"GENTLEMEN:

We have your Mr. P. N. Magrane's letter of April 7th.

Replying thereto, we beg to refer you to your copy of the contract (if your copy is misplaced we shall be glad to send you another copy) under the conditions of which notice for the termination of the contract between us is not in order at this time.

Very truly yours,

STANDARD FASHION COMPANY."

[The letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 12, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 85. During this time you had no personal interviews with the Magrane Company?

A. None whatever.

Q. 86. At some time thereafter were you advised that they had definitely terminated the sale of your patterns and the distribution of your advertising material?

A. As I recall, our Boston manager telephoned me, called me on the telephone, in July, and advised me that the McCall patterns were on sale, and that the sale of ours had been discontinued.

Q. 87. Do you remember what date in July it was that you learned that?

A. Yes [referring to a memorandum]; July 9th.

Q. 88. July 9th of this year, of course?

A. July 9th of this year.

Q. 89. Since that time have your patterns been handled by the defendant at all?

A. Not to my knowledge. On the contrary, so far as I know, they have not handled them.

42 Q. 90. The McCall patterns have been on sale over there ever since, so far as——

A. The McCall patterns have, so far as I know.

Q. 91. In July, when the agency was terminated by them, were you ready, able and willing to go on with it?

A. We were.

Q. 92. And did you make a written tender of performance to the defendant?

A. I wrote a letter to them, following Mr. Marsh's telephone message, and asked him to deliver it to them, which I believe he did.

Mr. Dodge: Have you a letter of July 14th, 1917?

Mr. Sullivan: No. Is Mr. Marsh here?

Mr. Noble: Yes.

Mr. Sullivan: Subject to Mr. Marsh's verification, he is going to testify, is he, that he delivered it to us?

Mr. Dodge: Yes.

The Court: Is Mr. Marsh here?

Mr. Sullivan: Yes, sir; he has been sworn.

Mr. Dodge: Was that letter of July 14th, 1917, delivered [passing a paper to Mr. Marsh]?

Mr. Marsh: Yes.

Mr. Dodge: I understand you don't object, Mr. Sullivan?

Mr. Sullivan: Not if he is going to testify that he delivered it.

Mr. Dodge: Yes.

"July 14th, 1917.

Messrs. Magrane Houston Company, Washington Street &Temple Place, Boston, Massachusetts.

GENTLEMEN:

We are in receipt of advice from our Boston representatives that you have placed on sale in your store on Washington Street and Temple Place another make of patterns than Standard Patterns, namely, McCall Patterns manufactured by the McCall Company.

This is in violation of your contract with us, which provides among other things, that you shall not sell or permit to be sold on said premises any make of patterns other than Standard Patterns.

We hereby demand that you immediately withdraw from sale in said premises any make of paper patterns other than Standard Patterns and that you restore Standard Patterns to sale in said
43 premises, and that you proceed to continue to perform all the conditions of your contract with us for the balance of its term.

Very truly yours,

STANDARD FASHION COMPANY.
J. T. SCANLON,
President."

And in pencil at the bottom: "Deld. by Mr. Marsh to Mr. Hanley July 17, 1917—12.15 P. M."

[The copy of letter of which the foregoing is a copy is marked "815 Eq., Pl'ff's Ex. 13, J. E. G., Jr., Dep. Clk."]

The Court: What is the date?

Mr. Dodge: The date is July 14th, 1917.

Q. 93. Now, referring again to the contract, Exhibit 7, you say that this is in the regular form of agency contracts?

A. Yes, that is our regular printed form of agency contract.

Q. 94. There are various other concerns, are there, that are selling patterns and issuing advertising material, conducting a similar business, manufacturing and selling patterns?

A. Oh, yes; there are six or eight concerns in the business.

Q. 95. And what are the other principal concerns that are in a business similar to that of the Standard Fashion Company?

A. The McCall Company, the New Idea Company; they make a pattern; the Pictorial Company, the Butterick Company, the Home Company; that makes the pattern coming in what is known as The Ladies' Home Journal, and the Peerless Company and the May Manton Company. I think those are the chief manufacturers of patterns.

Q. 96. And is the McCall Company one of the largest pattern concerns?

A. Why, it seems to be the largest pattern company of any individual concern.

Q. 97. Do the other pattern companies, like yourselves, sell patterns to local agencies, in the main?

A. All the concerns mentioned except the May Manton Company market their products in substantially the same way that we do.

Q. 98. And are you familiar with the standard form of contracts which they have with their agencies?

A. Oh, yes; I have occasion to see them regularly; it is almost a matter of daily occurrence.

44 Q. 99. And you are familiar with the way the pattern business is conducted by them, as well as by your own company?

A. Well, I consider it a part of my duty and a part of my business to keep in very close touch with all the concerns in the business.

Q. 100. Whether or not the agency contracts of the other companies are substantially like that of the Standard Fashion Company?

Mr. Sullivan: I don't want to be captious, and there is not much of an issue of fact here, probably, but it strikes me that that is going rather far.

The Court: It strikes me that it is going pretty far to go into the contracts made by other companies. What bearing does it have on the interpretation of this contract?

Mr. Dodge: I will withdraw that for the present. It may be that I can make it competent later.

Q. 101. Did the defendant under this contract exercise the right of semi-annual return of patterns?

A. Yes.

Q. 102. And I want to ask you in regard to the provision in the contract that the agent shall not handle the patterns of any other manufacturer. Whether or not the agencies of pattern manufacturers in this contract are commonly exclusive agencies in that way, or not?

A. Yes, sir, practically altogether. I don't know of ten exceptions among the probably thirty or forty thousand stores handling patterns.

Mr. Sullivan: I object to that. Whether they are exclusive agencies or not I suppose depends upon the construction of the contract in each case.

The Court: It seems to me so.

Mr. Dodge: Well, that, if your Honor please, seemed to me to be competent, because I am dealing now with the question of competition and monopoly, etc., under the Clayton Act.

The Court: At the present time it is this contract that we are dealing with. What other companies have done with their contracts it seems to me is immaterial. It is what was done here.

Mr. Dodge: I think that that is entirely so, unless the fact that the Clayton Act is involved here makes it competent. It is only on that issue that I offer it.

45 The Court: Whether other companies have successfully violated the Clayton Act or not does not interest us here, of course.

Mr. Dodge: It seems to me that on the question of whether there was a substantial attempt to acquire a monopoly, or a substantial limitation of competition, the question of universal methods, the methods of all companies in the business, might have a bearing.

The Court: Mr. Scanlon has already testified to the number of concerns doing a similar business in this field. That is covered pretty well.

Mr. Dodge: I wanted to show their method of doing it under the contract.

The Court: What the methods pursued by the different companies are it seems to me is immaterial here.

Mr. Dodge: I think that possibly that question may be competent later on, your Honor, in connection with the point made by the defendant in his answer, that we could establish another agency just as good somewhere else in Boston.

The Court: Then we will pass it for the present.

Mr. Dodge: We will pass it for the present.

Q. 103. I will ask you this question, with regard to the clause in your contract with the defendant, that the defendant should not handle any other make of patterns: I want you to explain to his Honor the advantage, if it be an advantage, to the manufacturer, the agent and the public, as you see it, to have an agent handle only one make of patterns.

A. Well, as I have said, I have been in this business twenty-eight years, and in all that time there has never come under my observation a condition where more than one make of pattern was handled in one store, and my experience in the business and knowledge of it induces me to believe very firmly that any other condition for the handling of the patterns would result disadvantageously to the manufacturer, and to the merchant acting as agent, and to the public, for this reason,—may I detail my reasoning on the matter?

Q. 104. Yes.

A. Take it, for instance, in the average town of say, 10,000 population, where there are five or six stores, and each of them han-

dles a pattern. Each of them, we will assume, does a
46 business of a thousand dollars a year in patterns, which would be about the business expected to be done in a town of 10,000 population. Now, if each of those stores were to handle all of the makes of patterns, or five or six, I cannot conceive that the total sales of patterns in the town would be materially increased,—that the sale of patterns and the use of patterns would be materially advanced. On the other hand, if each of the stores handled, say, five or six different manufacturers' patterns, they would have their overhead expenses and all the expenses incidental to the handling of patterns very largely increased; they would have investments in five or six different stock patterns, instead of in one; they would be at a disadvantage and loss in the exchanging of patterns, having to deal with five or six different stocks instead of one.

Q. 105. Could they cut down the amount of stock if they were carrying five or six stocks so that the total would be no larger than one stock?

A. No; I think not. To handle a business satisfactorily it is requisite that prompt service be given to the public, and if the stock is cut down it can be done only at the expense of the serviceability of the stock, and consequently, as I see the matter, it would discourage trade and result in a curtailment of the sale of patterns. If, for instance, a merchant, under present conditions, were carrying a complete stock in all sizes, and doing a business of a thousand dollars, and he changed his methods and had five stocks in which he did a business of $200 each, the total investment would then be the same as is represented in one stock, but he could not do so satisfactory a business, because if he had five separate stocks it would result in his carrying only about two sizes of each pattern, and the result would be bad service to the public, no doubt, as the matter rests in my mind.

Q. 106. How about the question of space in the store?

A. It follows naturally, I think, that if he has five stocks of equal size they will take up five times the space of one, and it takes up that additional overhead for rental of the appropriate space. And the five stocks could not be handled by one salesgirl, or by the number of sales persons that would ordinarily be required for one stock.

So that the merchant would have to duplicate his expenses
47 and make his service expenses behind the counter larger. And he would have anywhere from three to five times as much in the way of transportation charges during the month. He would have to distribute the fashion sheets for each of the makes of patterns in the same quantity that he would if he were handling only one, making his expenses for that part of it five times what they would be if he handled only one. That is from the merchant's standpoint. Now, from the pattern manufacturer's standpoint: In handling a thousand dollars' worth of business, selling patterns to the public out of the stock necessary for the handling of that business, his exchanges of patterns are a fixed amount; they will average a certain figure. Now, if the merchant carries five stocks, which he would have to do if he represented five pattern manufacturers, and

the sale of any one pattern in that store should be reduced to one-fifth its normal volume, then the exchanges would be so large as to make the business quite unprofitable to the manufacturer, and under those conditions we could not afford to place our patterns with agencies under the terms that we now do; our expenses on the exchange of patterns would be so large as to make it quite impossible, and we would have to change the terms to a less favorable basis to the merchant, or very substantially increase the retail price to our public. Now, from the standpoint of the public: As I see it, there would be less satisfaction in doing business under those conditions than there is now. As I stated, the manufacturer could not give the present terms unless he got the business that is contemplated by the present methods. If the handling of the business should be made more expensive, we would have to narrow the terms to the merchant or increase the price to the public. If the merchant kept up the five stocks in serviceable shape, so as to give the same satisfactory service with the five stocks that he had given with one, his expenses would be so largely increased that the losses would prevent his keeping on with the business for any length of time, and the result would be that he would have to give it up, and the public would be deprived of the facilities for securing the patterns. So, as I say, the public would have the alternative of paying a very much larger price for the patterns than they now pay.

48 The Court: Do you fix the basis on which the patterns shall be sold?

The Witness: We print on the label of each pattern the price at which it is required to be sold.

Q. 107. What is the price of the average pattern?

A. About twenty cents, or nineteen cents.

Q. 108. Whether or not one of the chief differences between patterns and other goods is to be found in the necessity, in the case of patterns, that the agent shall carry all these different styles? He cannot cut his pattern stock into quarters, and take on four different kinds, making an aggregate of no more patterns, can he?

A. No. I have stated that there are a thousand or twelve hundred styles that are current styles, out of which the public is making its selections every day. Now, in the smallest community the variety of styles will be as great as it is in the biggest city, so that these stores in the different little communities have to carry all the styles, and limit only the number of sizes, so as to keep their stock within a reasonable ratio to the volume of retail business.

Q. 109. Do you sell direct to the public?

A. Oh, yes, quite largely.

Q. 110. And in your sales to the public do you undertake to impose any condition whatever on the purchasers?

A. None whatever; no.

Q. 111. You sell at the ordinary retail prices?

A. At the ordinary retail prices. We do that in the sales rooms, and we do a very considerable mail order business.

Q. 112. Your contract contains a provision restricting your agent from selling below the retail prices?

A. Yes.

Q. 113. What is the object of that clause?

A. It has been a custom in the business ever since I have been connected with it to make contracts with the merchants, and as a matter of business we make them to cover a term of years, so that we won't have to be at the expense of sending agents round to them every year or two to get them to renew their contracts, and those contracts also renew themselves, to bring about what we consider a proper economic administration of the business. Now, a
49 merchant signing that contract, as we see it, is entitled to expect to make a profit on the business during the time he carries it on. If the merchant were threatened with competition from other merchants, in the neighboring town, or in the neighboring square, perhaps, in the sale of the same patterns, at prices other than those at which he himself is required to sell them, he could not do business at a profit; he could not compete with price-cutting in the next block, or in the next community. Now, in undertaking to make a contract with us for a term of years, it is only ordinary prudence on his part to require that he be protected in securing from the public a fixed price; and we fix the price largely in view of those considerations.

The Court: Do you understand that in this contract there is any agreement that the party of the second part shall have the exclusive agency in the city of Boston?

The Witness: I beg your Honor's pardon?

The Court: Is there any agreement in this contract, do you understand, that the party of the second part, the defendant here, shall have the exclusive agency in any part of the City of Boston.

The Witness: In what sense, sir, are you using the word? Do you mean an exclusive sale of our pattern in his store, or in a given territory?

The Court: In a given territory.

The Witness: No, sir. There was no such provision.

The Court: You were speaking about the protection of the agent, and saying that you thought that the agent ought to be afforded protection by establishing a price at which agents bound themselves to sell your patterns only in a certain territory?

The Witness: Well, we very, very seldom, practically not at all——

The Court: In other words, was there a binding agreement on your part not to have another agency in that territory?

The Witness: No, there is no agreement on our part not to have another agency in the same territory.

Q. 114. But this agent does have the promise that if you do have another agent in that territory he will have to sell at the
50 same prices?

A. He could not under our contract sell to the public at different prices; he must sell at the same prices.

Q. 115. That is, your agencies and your own concern are at all times selling the patterns at the same prices?

A. Yes.

The Court: And in this particular section of the City of Boston

where the defendant is located, after making that contract with the defendant you were at liberty to make as many more contracts establishing agencies as you saw fit?

The Witness: Well, I will have to make an explanation with regard to that, your Honor. At the time we made the contract with the defendant we were. Subsequently I made a contract with the R. H. White Company that is referred to in the bill or answer. Now, when I made the contract with the R. H. White Company they raised the question as to how many agencies we were going to place, and I agreed with them that we should place no other than the one with the Magrane Houston Company.

Mr. Dodge: Within a quarter of a mile.

The Witness: Within a quarter of a mile; some circumscribed area representing the shopping district.

Q. 116. Right along that line, I will ask you whether or not at the time you established your agency with the Magrane Houston Company nearly all of the department stores and dry goods stores in the vicinity were occupied by agencies of one or another of the pattern companies.

A. Yes. Of my own knowledge I may say that every department store down town, except R. H. Stearns and Filene, was handling patterns. You will notice that in my response to their application I inquired particularly regarding the pattern contract which they then had with the home company. That is a thing that we have to keep in mind always in our arrangements for extending our agencies.

Q. 117. When the Standard Fashion Company started business in Boston what other concerns were there that were manufacturing and selling patterns?

A. Do you mean when we originally started, several years ago?

Q. 118. Yes.

51 A. The Butterick Company; the Demorest concern; and the Imperial, or some such concern. The Demorest was one, and I think the Imperial was the other.

Q. 119. So that all the other competing concerns that you have mentioned have come into business since that time?

A. Yes, all of the competing concerns have come into existence since the Standard Fashion Company started.

Q. 120. You mentioned six or seven other companies. Do you know of your own knowledge whether all of them have agencies within the immediate vicinity of the Magrane Houston store, that is, in the dry goods centre of Boston?

A. I have been into all the stores in Boston, and I have observed what patterns they handle, except the two prominent stores that I mentioned.

Q. 121. I was asking whether all the pattern companies which you mentioned when you gave us the list have their patterns handled in the immediate vicinity of the Magrane Houston Company's store in Boston?

A. Yes, all except possibly the Peerless. I don't recall any agency that the Peerless has; all the others have.

Q. 122. Do you recall of your own knowledge where the McCall Company has agencies in the centre of Boston?

A. Yes; I have seen their goods recently, besides in the Magrane Houston Company's store, in the Bacon store and in the Gilchrist store and in Butler's store.

Q. 123. The Gilchrist store on Washington Street?

A. The Gilchrist store on Washington Street.

Q. 124. And the Bacon store in the Siegel building?

A. Yes.

Q. 125. Are the patterns of all the concerns sold in Boston the same way, done up in envelopes like this?

A. All patterns are made up in just the same fashion.

Q. 126. And are of substantially the same kind of goods?

A. What do you mean by "goods?" The paper they are cut from?

Q. 127. Well, I mean they are completely and strictly in competition with each other. Are there any differences between the patterns made by other concerns and those made by yours, except that you, perhaps, claim to have better designers, and to get up more attractive styles?

A. Yes, the competition is extremely keen.

52 Q. 128. There is the same classification, is there not?

A. Yes, and they look very much alike; they fold them up alike, and put them in envelopes very much alike.

The Court: These patterns are confined to garments for women and children?

The Witness: Yes, for women and children. We make some patterns for men's garments, overcoats, etc., but we do not do that very extensively; there is not much occasion for it, though we do show on our catalogues patterns of men's garments.

Q. 129. I will ask you whether or not a contract of the sort which you have before you, and which you say is your universal form, has a tendency to create monopoly or to lessen competition in the pattern business?

Mr. Sullivan: I object to that.

The Court: That is a matter of opinion that it would be pretty difficult for him to answer, it seems to me. That is a question for the court, is it not?

Mr. Dodge: That is undoubtedly a question for the court. I will not press it if your Honor thinks that it is not proper.

The Court: It seems to me that it is really a question for the court to deal with, and that I should exclude it if it is objected to.

Q. 130. Perhaps Mr. Marsh is the man who should be asked about the number of other agencies that these different pattern companies have in Boston, the location of them, and so forth, or are you personally familiar with that?

A. No. I know the number of agencies throughout the country, throughout the United States and Canada, that handle patterns, but I guess that Mr. Marsh could answer better for Boston.

Q. 131. How many agencies has your company in Boston today?
A. I couldn't state positively; I suppose eight or ten.
Q. 132. That is, in the entire metropolitan district?
A. Yes.
Q. 133. How many have you in Boston proper?
A. Do you mean in the down town section?
Q. 134. In the down town retail dry goods section; yes.
A. I guess only the R. H. White Company now.
Q. 135. Only the R. H. White Company?
A. Yes.

53 Q. 136. As a matter of business judgment, is it advisable for one pattern company to seek a very large number of agencies in a particular small city, or in a particular section of a large city?
A. No.
Q. 137. Why is that?
A. Well, first is this consideration which, if my experience counts for anything, is important, and, as I say, I have been at it twenty-eight years, that to handle the business satisfactorily to the public and to the distributing agency you must have a complete stock of patterns. We have found it necessary, it is the custom of the business, to protect the agent against loss on unsold patterns. Now, the minute you get to a condition where the number of patterns exchanged grows disproportionate to the number you sell, you handle the business at a loss to yourself, and probably at a loss to the agent. So that it has been our policy, and I think it has been the policy of the companies generally, to place their agencies in such a way that each one will have a reasonable opportunity for an independent business in patterns, a business of such a kind as will make the handling of it profitable for him and profitable for the manufacturer.
Q. 138. Now, with reference to some of these companies that have come up since your company has been doing business under this form of agency contract, the McCall Company is one of them, isn't it?
A. Yes; the present McCall Company came in the business since the Standard Fashion Company began business.
Q. 139. And do you know how many agencies the McCall Company claims to have in the country today?
A. They claim to have twelve thousand. That is the latest thing I have seen.
Q. 140. They claim to be the biggest concern of the kind in the country?
A. They claim to do a bigger pattern business than any other concern and to have more agencies. I have seen them advertise 12,000.
Q. 141. What other concerns have gone into business of any considerable size since your company started?
A. This Home Company came into business in 1905. They claim to have something like five or six thousand agencies.

54 Mr. Sullivan: Mr. Scanlon's testimony is very entertaining and instructive, but we ought not to try this case entirely on newspaper publications.

Mr. Dodge: I wanted him to give us a notion of the comparative size of these companies as they are known in the trade.

The Court: You have got it in now, and you had better shut the door if you have got through.

The Witness: I said I had heard of it, but I have seen the advertisements of the McCall Company and of the other companies.

Mr. Dodge: I did not suppose that you would require me to summon representatives of those other companies here. It is only a minor point. Do you object now to my going any further along this line?

Mr. Sullivan: Yes; I think that something other than the boasts or claims of other companies in the newspapers ought to go in.

The Court: I suppose that Mr. Scanlon knows something, in a general way, about the magnitude of their business.

The Witness: Oh, yes; I travel around the country a great deal. I see them, and I see the reports that our travelers make, and in that way I know about the business of the different agencies. I should accept the McCall Company's claim that they have about 12,000 agencies.

The Court: You know whether they are doing a large business or not, I suppose?

The Witness: I think they are doing a slightly larger business than our company, and they have nearly double the number of agencies.

The Court: You started by asking him what other concerns of any considerable size have gone into the business since his company started.

Mr. Dodge: Yes; I wanted him to name the companies today that are in this business.

The Witness: The Pictorial Company began business within the last twelve or thirteen years, and they do a very considerable business, I have no doubt at all; I know they do, and they have got six or eight thousand agents, I think. The Home Company also
55 came in in 1903, and they claim to have about 5,000 agents, and I believe they have, and they do a very considerable business.

Q. 142. Those are the ones that have sprung up in recent years, are they?

A. Those are the principal ones; yes.

Q. 143. What is the total annual business of your company?

A. Our total annual business runs a little somewhat in excess of a million dollars.

Q. 144. In patterns?

A. No, not in patterns. In patterns it runs half a million to six hundred thousand; that is, our income and net prices.

Q. 145. And the rest of the business is in connection with the magazines and publications. Tell us about some of the considerations that guide you in selecting a particular agent. I wanted to ask you whether or not a store like the Magrane Houston Company's store had advantages over a large department store as an agency for the sale of patterns?

A. In my judgment, the Magrane Houston store, by reason of its reputation as a piece goods store, and its favorable reputation, to my positive knowledge, in Boston as a great piece goods store, is a peculiarly valuable store as an agency for a pattern outfit.

Q. 146. What do you say as to its location?

A. Well, of course, I am not a resident of Boston, but its location seems to me to be the precise centre of the shopping district. I believe that the store carries a sign, "Boston's Busiest Corner," or something of that kind.

Q. 147. Is it, or was it in July last, or is it today, possible for your company to establish any other agency in the vicinity of the retail dry goods district of Boston?

A. I mentioned, addressing his Honor particularly, the fact that the contract that I made with the R. H. White Company precludes our making arrangements with anyone else than the Magrane Houston Company; but, apart from that, having visited the different stores, and having had our representative visit them, I know that they are all parties to contracts that have considerable periods of time to run, and we could not replace the Magrane Houston agency without resorting to the tactics of the McCall Company in getting somebody to make a contract.

56 Q. 148. And I will ask you, subject to his Honor's ruling upon its admissibility, whether you know, as a matter of fact, concerning the existence in the contracts which the other agents or dry goods stores have with the pattern manufacturers of clauses precluding them from handling any other patterns?

Mr. Sullivan: I pray your Honor's judgment.

The Court: That is upon the question of procuring some other retail store to handle the patterns of the plaintiff?

Mr. Sullivan: If your Honor please, these are accessible written contracts, all of them. This is Mr. Dodge's own witness and he is asked to testify as to the contents of a written contract not shown to have been lost or destroyed, and it has not been shown that it is not within their means to summon the production of the contract into court. It seems to me that it would be clearly incompetent.

The Court: If the witness knows the general custom among pattern manufacturing companies with reference to placing such clauses in their contracts, it is that particularly that he is asked to testify to, not what a special contract contains, not any particular contract, that would not be admissible, but the general custom of the trade, if he knows it, he may testify to.

Mr. Dodge: Yes, your Honor.

Q. 149. Do you know the general custom of the trade in that regard?

A. Why, in my capacity as head of my business I have had occasion to see hundreds of contracts which——

Mr. Sullivan: I object to that. That is not responsive.

The Court: The objection is made that the answer is not responsive. I think that the question should be answered directly.

Mr. Dodge: Will you read the question?

[The question is read by the reporter as follows:]

"Q. 149. Do you know the general custom of the trade in that regard?"

A. I do.

Q. 150. With reference to the existence of this clause in the contracts of agency and what the custom of the trade is?

A. The custom of the trade is to require the agent to han-
57 dle exclusively the patterns of the manufacturer with whom that merchant makes his contract.

Q. 151. And that being so, was it in July, or is it today, possible for you to establish anywhere in the retail dry goods district in Boston an agency as good as that of the Magrane Houston Company?

The Court: I don't think that he can testify to that.

Mr. Sullivan: He has already testified that he has eliminated himself from the centre, voluntarily, by contract.

Mr. Dodge: Wholly apart from that.

Mr. Sullivan: Aside from that, it is too speculative a question; it involves the question of the desirability and value of the contract with the Magrane Houston Company, a comparison of that with the possible value of some others that we cannot get at.

Mr. Dodge: Let me withdraw it and put another question.

The Court: If the witness knows, I think that it would be helpful to the Court, and it seems to me admissible, to have him testify, or to furnish information or evidence, as to whether there were other big concerns here that were free to make contracts.

Mr. Dodge: Yes; that is about the form which I had it in mind to put the new question. I will ask you that, Mr. Scanlon.

Q. 152. Were there in July, and are there today, other department stores or dry goods stores in the City of Boston, in the retail dry goods district of Boston, which are, or were, available for the establishment by you of an agency?

A. There was none—not in July, and not today, to my knowledge; there was not.

Q. 153. You said something about two stores in which they were not handling patterns; one was Filene's and one was Stearns'. Now, what have you to say with reference to the possibility of establishing an agency in either of those stores?

A. Why, the Stearns store handled our patterns at one time for several years, and terminated the arrangement regularly, as I recall it, and I don't recall the gentleman's name, but the manager of the business told me that he figured that their class of business was such that their store did not represent a good outlet for patterns, and that they were going out of the pattern business, and he told me
58 that they were not going to handle patterns any more, and they have not.

Q. 154. Do they sell piece goods to any extent?

A. High-priced piece goods; yes.

Q. 155. Do they cater to the class of customers to whom it appeals to buy patterns to make their own clothes?

A. I shouldn't say so.

Q. 156. What have you to say about the Filene store?

A. Mr. Jackson, I think, told me that he would regard patterns as being competitive with their business. They sell ready-to-wear garments, therefore Filene's store wouldn't handle patterns under any conditions.

Q. 157. One other thing I want to ask you with reference to the defendant: Is the defendant's store an old store or a new one?

A. Now, if I am to speak of my own positive knowledge, I should say that it has been there, to my own positive knowledge, twenty-five years about.

Q. 158. As long as you have been connected——

A. It was formerly the Houston store, or Houston & Henderson, and J. B. Henderson, and there are several names that it has been known under.

Q. 159. Now, I am going to ask you this question: What is the value to your company of the right to do business under this form of contract?

Mr. Sullivan: I object to it.

The Court: I do not know that I understand what that means.

Mr. Dodge: I do not wonder, your Honor. It is an unusual form of question, but, in substance, that form of question has been sustained where the jurisdiction of the court is attacked on the ground that the matter involved does not exceed $3,000. Now, what we are seeking here to do, of course, is to establish the validity of these pattern contracts under the Clayton Act. It is not a mere question, so far as that aspect of it is concerned, of litigation with this particular defendant to establish that he has broken this contract.

The Court: But then the only inquiry here is what was the value to you of this contract.

59 Mr. Dodge: Yes, what is the value——

The Court: That is, this particular contract.

Mr. Sullivan: And simply on the question of jurisdiction, and not as a basis for mulcting the defendant in any way.

Mr. Dodge: No. This is simply on the question of the jurisdiction of the court. There is a recent case in the Supreme Court of the United States——

The Court: That is, what is alleged, of course——

Mr. Dodge: It is like the case of the stock exchange quotations, which were leaking out somewhere, and under an action in equity to restrain the defendant from using those quotations the Supreme Court of the United States held that, for the purpose of determining the jurisdictional question, the value of the right of the plaintiff to keep the control over those quotations was a proper question.

The Court: What the plaintiff claims?

Mr. Dodge: Yes, sir; and one of the plaintiff's officers was permitted to testify in that case.

Mr. Noble: He gave his opinion as to the value, and the court said that it was proper.

Mr. Sullivan: What is the case?

Mr. Noble: I will give it to you. It is the case of Hunt v. The New York Cotton Exchange.

The Court: Is there any objection to it if offered for that purpose?

Mr. Sullivan: Not if offered solely for that purpose.

The Court: Then the witness may answer.

[The question is read by the reporter as follows:]

"Q. 159. Now, I am going to ask you this question: What is the value to your company of the right to do business under this form of contract?"

A. The right to do business under that form of contract is worth to us, I should say, several hundred thousand dollars.

Q. 160. Several hundred thousand dollars?

A. Yes. It is a very important part of our business.

Q. 161. Why do you say that?

A. Because, in my judgment, we could not operate properly under any different kind of contract.

60 Q. 162. I have in mind, of course, particularly the requirement that the agent shall not deal in the patterns of others.

A. Yes, and I have stated that I consider that provision of our contract a vital consideration.

The Court: Under this form of contract, I understand?

The Witness: Yes, sir.

Q. 163. Now, Mr. Scanlon, I want to come to the question of the damages, so far as we can show them. Have you with you the books of your company containing the account with this defendant?

A. I have them in my bag, the original ledger pages. I have made an extract from the pages if that would answer the purpose.

Q. 164. Well, I want the book itself, too.

The Witness: Ask Robert if he will open that little black bag of mine.

[Certain papers are passed to the witness, who hands them to Mr. Dodge.]

Q. 165. These are sheets from a loose-leaf ledger system of bookkeeping?

A. Yes; these are from our ledgers.

Q. 166. Those are the original ledger pages containing the account with the Magrane Houston Company?

A. These are the ledger pages covering the whole of our account with the Magrane Houston Company; yes, sir.

Q. 167. And have you made up certain tabulations from those ledger sheets?

A. I have.

Q. 168. The basis for which is entirely in that account which you have before you?

A. Yes.

Q. 169. I want to ask you, in the first instance, whether or not it is possible to show in dollars and cents all of the damage which you claim to have suffered from this alleged breach of contract?

A. I couldn't show it; no.

Q. 170. What features of the damage are there which you couldn't show in dollars and cents?

A. Why, the damage to our reputation is a big item, in my judgment.

Q. 171. What do you mean by that?

A. Why, the damage done us, for instance, by the McCall
61 travelers who are going over the country explaining that the Magrane Houston Company have thrown out our goods in favor of the McCall. It is an invidious kind of thing that you can't put your finger on. I shouldn't know how to calculate the amount of damage, though I have reason to know that it is considerable.

Q. 172. What do you say as to the diversion of the trade in the Magrane Houston's Company's store?

A. Please put it again.

Q. 173. The diversion of trade in the Magrane Houston Company's store to the McCall Company. That is, what I have in mind is this: Can you tell whether or not a person who now goes into the Magrane Houston store and asks for a Standard pattern is told that they do not keep it any longer, but that they have McCall patterns,—whether that person is going to go out and get one of your patterns, or be content with one of the McCall patterns? Of course you can't tell that.

The Court: How can he without knowing the workings of that person's mind?

Mr. Dodge: Of course he can't.

The Court: Can't we form some idea of what a person might do; how a person's mind might work?

Mr. Dodge: I think that it is a matter of argument. I simply wanted to point out, for that very reason,——

The Court: It is a matter of argument, is it not, rather than of evidence?

Mr. Dodge: I think it is; yes, sir.

Q. 174. You can give us, however, the financial results of the period during which the contract was kept, can't you?

A. Oh, yes, of course, because that is a matter of record knowledge.

Q. 175. I observe that the contract itself calls for an original payment of only $500 on account of $1,000 of patterns ordered, the contract providing that the other $500 shall remain as a standing credit until the termination of the contract. Has that $500 been paid to you?

A. No.

Q. 176. That is the outstanding credit?

A. Yes.

The Court: That is, the credit given to the Magrane Houston Company on its books, $500, is still unpaid, you say?

62 Mr. Dodge: Yes, sir. That is, they order $1,000 of patterns at the beginning, and pay in cash only half.

The Court: They were given a credit of $500 on account of goods, and that is under the contract?

Mr. Dodge: Yes, sir.
The Court: And that remains unpaid?
The Witness: That remains unpaid.
Mr. Dodge: That $500 is to remain unpaid as a standing credit, the contract says, during the continuance of this agreement, and to be due and payable on its termination.

Q. 177. On current account, for goods supplied, was there an indebtedness which remains unpaid?
A. Yes.
Q. 178. How much was that?
A. Three hundred and some odd dollars. I don't seem to have the precise amount here.
Q. 179. I think the ledger shows it.
A. It is on the ledger sheet there; yes. It would be on the last sheet.
Q. 180. We will look that up in the ledger. I want to ask you now whether or not you have the statistics from the books of the total business done with the defendant up to July 9, 1917?
A. Yes, I have those figures.
Q. 181. What was the total number, or total amount, in dollars and cents, of patterns purchased from you by the defendant?
A. The total was $6,199.80.
Q. 182. How much?
A. $6,199.80.
The Court: That was for all the time of the contract, from the beginning until they claim to have terminated it?
The Witness: Yes.
Q. 183. Does that include a certain amount of patterns that you sent in exchange for patterns that were returned?
A. Yes. Of that amount there was $1,578.83 that was furnished in exchange.
Q. 184. That means that you took the old patterns back at ninety per cent of their original cost and supplied the new patterns?
A. Yes, supplied new patterns, and credit allowed for out of date patterns, the new patterns so supplied amounting to $1,578.83. That is included in the $6,199.80.
Q. 185. What was the total sum paid you for fashion sheets,
63 or charged to the defendant for fashion sheets?
A. In dollars and cents, $1,672.50.
Q. 186. And publications of other sorts?
A. $1,773.73.
Q. 187. And that made gross receipts from the defendant, or gross amounts charged to the defendant, in so far as they have not been paid, of what?
A. $9,746.03.
Q. 188. Now, to go back for a moment to the question of the amount paid on current account at the termination of the contract, and still unpaid, does that ledger page enable you to give us the exact figure?
A. Yes. There appears to be a debit balance for current purchases of $311.69 that is unpaid.

Q. 189. $311.69?

A. Yes.

Q. 190. Have you computed the average monthly figures for the business actually done with the defendant during the time that the contract was performed by it?

A. I have.

Q. 191. You have?

A. Yes.

Q. 192. How many months did the contract continue in existence,—continue to be performed?

A. They operated under the contract 29⅓ months.

Q. 193. Have you figured the average business per month, gross and net?

A. Yes. That amounted to about $3,960 for a year. That would be $330 a month.

Q. 194. That was the gross receipts, was it?

A. Gross receipts. It was $330.34, to give the exact figure.

Q. 195. Was that on patterns or on everything?

A. That is on everything.

Q. 196. Now, have you determined the profit on that business?

A. I have in a general way; yes.

Q. 197. And that amounted to what?

A. That amounted to $3,798.46. On the business done, do you mean?

Q. 198. You were giving us monthly averages now, weren't you?

A. I gave you the amount of the business, the average amount of the business done with them, during the period during which they operated under the contract.

Q. 199. Yes. Now, how did you figure the profit?

A. I figured the profit on the business they would have
64 done for the balance of the term of the contract, using the showing made by them while they did operate as a basis.

The Court: Can't you supply us now, following out the line of testimony which he has given—he has given the business per month done with the defendant, and you inquired as to the profit on that business, I understand?

Mr. Dodge: Yes.

Q. 200. Have you figured that?

A. The profit on the business actually done, which they had paid us?

Q. 201. Yes?

A. No, I haven't done that.

Q. 202. But you say that a certain——

Mr. Noble: Can't you calculate it from what you have got in?

The Witness: Oh, I could do it in a very little while, if it is required.

Mr. Dodge: I was going to inquire into the figures that you have got, and then come back to that, if it seems important.

Mr. Sullivan: Shouldn't we have the profits on what they had done, rather than the profits on what they might have done?

The Court: That would be the proper thing, to my mind. I suppose that the future must be predicated upon the past, and the future profits must be predicated upon the past profits, and that is why I called attention to the fact that we have not had the past profits.

Mr. Dodge: The witness has evidently figured the estimated profits for the future upon some basis, which I was going to ask him now to explain to us.

The Court: Is there any objection to taking this testimony, with the assurance that the other will be furnished?

Mr. Sullivan: No, sir.

The Court: Then proceed.

Mr. Dodge: Why not let him figure it now?

Mr. Noble: I think he is figuring it now, if your Honor please.

Mr. Sheehan: He has got all the items there now from which he can figure the profits.

65 The Witness: During the term which they operated under the contract the amount of goods sold was $6,787.84, which represented 47,509 individual patterns, on which our profit was $2,612.99.

Q. 203. As to the fashion sheets and publications?

A. Yes, as to the fashion sheets. I will give you that in a second. For fashion sheets they paid us during the term that they operated $1,672.50, on which our profit was $669.

Q. 204. Now, there remained only the other publications.

A. Yes, $1,773.73. That is made up of the Quarterly and the Designer. The margin of profit on them is not considerable. Now, I should have to take into the calculation on that the redemption of the coupons from the Quarterly, which affects our profit. That affects our profit on the publication. I would have to go into that. On the whole $1,773.73 I should say that the profit was not more than a couple of hundred dollars on that.

Q. 205. Now, in your figures for the unexpired term of the contract you took 19¾ months?

A. Yes.

The Court: Let me get clearly in my mind what you claim. The total that you claim, while the contract was in force, $2,612.99, is that profit on fashions?

The Witness: On patterns; and $669 on fashion sheets.

The Court: And then on your Quarterly and other publications you estimate about $200.

The Witness: About $200 on the $1,773.73.

The Court: And that represents the total profits during the term of the contract?

The Witness: The total profit on the contract for the term they carried it.

Q. 206. And that is how much?

A. $3,481.99.

Q. 207. You then computed, from your figures, the profit that might have been made during the remaining 19¾ months of the business at the same rate?

A. On the same dollars and cents basis, but taking into account the increased price of the patterns; that is, I estimated the number of patterns that the same amount of dollars and cents would represent.

Q. 208. That is, you assumed that they would sell the same
66 amount of patterns per month?

A. Assuming that they would sell the same amount of patterns——

Q. 209. And take the same amount of publications and advertising matter?

A. Yes. Well, that would be the case under the contract.

Q. 210. Now, with regard to the amount of patterns sold, is it your experience that the number increases or diminishes as the agent's contract goes on, as time goes on?

A. It has been my experience that agencies generally increase their business as they go along.

Q. 211. Should you say that it would be conservative to assume only the same amount of business for the balance of the contract period?

A. That would be my judgment, that that would be a conservative estimate.

Q. 212. In the figures which you prepared in arriving at that amount, you say that you took the number of patterns that the same amount of money would represent, but you say you took the advanced price of patterns. How much had the price of patterns advanced?

A. About 30 per cent.

Q. 213. When was that?

A. Well, the first advance was made in the summer of last year, and there were several other advances that have been made since then.

Q. 214. What has been the cause of those advances?

A. Oh, we had increased cost of material and everything.

Q. 215. That is, the war conditions generally?

A. The war conditions I have heard blamed for it; whatever conditions may be responsible for it, the fact remains that the raw material, paper and everything that goes into the business, have gone up enormously, and we increased the prices for that reason.

Q. 216. Now, will you tell us what the figures are for those 19¾ months, taking as the basis of this calculation a pattern?

A. The sales at retail are $6,787.84 in 29¼ months, and figuring at 7 patterns to the dollar, which was right, in my judgment, during that term, it appears that they sold 47,515 individual patterns, or at the rate of an average of 1,638 patterns per month. At current prices
67 now, which make the patterns run about 5 to the dollar, their sales of individual patterns for the remainder of the term of the contract, 19¾ months, would be 32,214 patterns, the retail price of which would be $6,443, and for which we would receive $3,221.50. The cost of these patterns would be $644, leaving our profits on these estimated sales for the remaining 19¾ months $2,587.22. That is the estimated profit on the pattern sales for the balance of the contract.

Q. 217. How about your magazines and fashion books?

A. I have got those here. They sold during the 29¾ months they operated 6,785 fashion books, or at the rate of 234 a month. This would make an estimated sale for the remainder of the term of 4,602 copies. Our records show that they redeemed the pattern coupons in 85 per cent of their sales. On those books we made no profit, I couldn't figure any profit on those, and that would leave 691 copies of the fashion book which they sold, and in connection with which we didn't have to furnish a pattern, and on those copies our profit was seven cents a copy, or $48.37. During the time they operated they sold 1,542 Designers, an average of 53 a month. For the remaining term that would make the sales of the Designer 1,042, on which I estimate that our profit would be about two cents a copy, making a profit of $20.84. Of the fashion sheets they were to take for the balance of the contract term 115,000, at the agreed price of $862.50. Our profit on these fashion sheets is $2.97¼ per thousand, so that our profit on these 115,000 fashion sheets would be $330.34. These estimated profits, with the balance owing on the original stock purchase and the current purchases——

The Court: Give us the total first.

The Witness: $3,798.46.

Q. 218. But that includes the standing credit of $500?

A. Yes, that includes this unpaid balance on the original stock purchased.

Q. 219. And the $311.69?

The Court: Let us know what those items are. The $500 and the $311.69 are what?

The Witness: The $500 is the unpaid balance on the original stock, and the $311.69 is for the current purchases during the last month or so that they had the agency.

68 The Court: There are those two amounts, $500 and $311.69?

The Witness: Yes.

The Court: So this sum of $3,798.46 includes——

The Witness: Includes those two amounts, making $811.69.

Mr. Sheehan: Which, if I may interrupt, I will say I have figured up, and the profit is $2,986.77, which, together with the $811.69, makes the total of $3,798.46.

Q. 220. There is one other element to be considered, and that is the value of the stock of patterns on hand. Now, when the contract rightfully comes to an end it obliges you to take back the patterns remaining in the agent's hands at 75 per cent of the cost, does it not?

A. The contract requires the agent to return the patterns to us, and requires us to purchase them at 75 per cent of the amount.

Q. 221. And to credit them on the account?

A. Credit them on the account against any indebtedness that there may be.

Q. 222. I understand that there is some question as to whether these patterns have been returned in this case, or accepted by you. What was the fact in regard to that?

A. The patterns were returned. We took them in and notified them that we were holding them subject to their order.

The Court: There has been no credit, then.

The Witness: We haven't passed any credit.

Q. 223. What was the amount to be if they were entitled to the credit?

A. $788.73.

Mr. Dodge: That is all.

The Court: Just give me that figure again, if you please.

The Witness: The credit they would receive is $788.73. That is based on their bill of the patterns to us, which, of course, would be subject to verification by count. They billed us with $1,051.63, and if that is correct the credit would be $788.73.

Mr. Dodge: That is all.

Cross-examination.

(By Mr. Sullivan:)

X Q. 224. What was the date, Mr. Scanlon, of the contract with the R. H. White Company?

A. The date on which it was executed?

69 X Q. 225. Yes.

A. I think some time in February. I don't know that I——

X Q. 226. February of this year?

A. Oh, I can give you the exact date, sir [proceeding to refer to a paper]. February 7, 1917.

X Q. 227. May I see that? Or I won't take it at this moment. And that is the contract that you have referred to as containing a clause that prevented you from taking any more agencies within a certain distance of it, is it?

A. That is the contract; yes.

X Q. 228. Had you received any notice at that time from this defendant of any intention to give up its contract?

A. None whatever; no.

X Q. 229. The first notice you got from this defendant was contained in the letter that Mr. Dodge has introduced?

A. Yes.

X Q. 230. That is, there was no dicker, no oral dicker, between the defendant and anyone entitled to represent you?

A. None at all. We had, I think, in January, an inquiry from the Magrane Houston Company for a copy of the contract.

X Q. 231. Not at all, is your answer,—no dicker at all?

A. No dicker; no.

X Q. 232. Did Mr. Marsh ever say anything to you that would indicate that they thought that they had a right to give up their contract?

A. Are you speaking of prior to February, 1917?

X Q. 233. Prior to the letter that has been read here formally notifying you that they had given it up?

A. Which letter are you referring to now, the one of March or the one of April?

X Q. 234. The one of April 7.

A. Only the letter of March 17, was it?

X Q. 235. There was no oral communication prior to March 21 of any nature to you?

A. None.

X Q. 236. You are apparently in active control of the plaintiff's business?

A. Quite actively in control.

X Q. 237. You have your finger on things there pretty definitely, haven't you?

A. I think so; yes, sir.

X Q. 238. You are there nearly all the time, or in touch with its business all the time?

A. Yes.

X Q. 239. And you didn't hear anything until the letter
70 of March 21 indicative of an intention on the part of the defendant to avail itself of what it thought was its rights?

A. Nothing except what I attempted to mention, a request in January for a copy of the contract.

X Q. 240. Had you begun to dicker with the R. H. White Company before you got that inquiry?

A. No.

X Q. 241. So that you got an inquiry in some form for a copy of the contract. Was that inquiry in the form of a letter?

A. Yes.

X Q. 242. You got a letter asking for a copy of the contract, did you?

A. I think that Mr. Marsh wrote me about it, or the letter came direct from them.

X Q. 243. And then you began to fortify yourself in that locality?

A. No.

X Q. 244. At any rate, if it is merely a coincidence, it is a fact that on getting a letter in January, asking about the contract, you began to dicker with the R. H. White Company?

A. No. The fact of the matter is that I had completed an understanding with the R. H. White Company two years before that for the restoration of our goods to their store.

X Q. 245. When?

A. The summer of 1915.

X Q. 246. A written agreement?

A. Why, no. We got along to this point——

X Q. 247. No is the answer, is it?

A. Yes.

X Q. 248. Was there a written agreement, a writing?

A. No.

X Q. 249. So that you did take up—did you personally take up the negotiations with the R. H. White people?

A. I took them up myself; yes, sir.

X Q. 250. Came on to Boston?

A. Yes.

X Q. 251. You have been in Boston a great deal in your business life?

A. I don't know what you would call "a great deal". I have been here a number of times; yes, sir.

X Q. 252. So that you have been familiar with the business section, thoroughly familiar with it?

A. I should say so, the dry goods section.

X Q. 253. And did your taking up with the R. H. White people the matter of a contract have anything to do with the feeling
71 that the defendant was going to give up its contract?

A. It had no relation to it whatever.

X Q. 254. Did you give the defendant any notice or statement that you were going to do business with a competitor?

A. Are you speaking of January, or of any prior time?

X Q. 255. In January.

A. In January I had nothing to do with the Magrane Houston Company. At that time I didn't have anything to do with them.

X Q. 256. Then the answer is that you didn't in any way apprise the defendant that you were going to enter into a contract with the R. H. White people, is it?

A. The answer is that in January we did not.

X Q. 257. When did you?

A. When we made the contract with the Magrane Houston Company we told them that we would reserve the right to place our goods with anyone who wanted them.

X Q. 258. Who made that statement?

A. Mr. Kelly.

The Court: Strike that out.

X Q. 259. Did you personally, with anybody representing the defendant, discuss the matter of any other representative for your company in competition with them?

A. I personally, no.

X Q. 260. You, then, had nothing to do with the making of this agreement personally, other than taking reports from your accredited agent?

A. The agreement with the Magrane Houston Company, do you mean?

X Q. 261. Yes.

A. None. That is right.

X Q. 262. And at that time, when the agreement was entered into in November of 1914, how long had this form of contract been in existence and in use by you?

A. It had been substantially the same for a great many years, I should say.

X Q. 263. Substantially the same. How long had it been identical with this form?

A. In 1914? Several years, I should say.

X Q. 264. How many years?
A. Maybe two or three, or something of that kind.
X Q. 265. Pardon me?
A. Maybe two or three years; something of that kind.
X Q. 266. So that this is a contract which in this identical
72 form was in existence before the passage of this act which you have heard read, before 1914, is it?
A. Yes.
X Q. 267. And in the form of contract which was in use prior to this one the use of this vital term here was different, was it not, the phraseology?
A. No, the phraseology was precisely the same.
X Q. 268. Was the phraseology with reference to the term of the contract the same as the printed matter here?
A. With regard to the term of the contract, it carried a renewal from year to year, instead of from term to term.
X Q. 269. Yes. So that in making over the contract, instead of making it a definite time, you introduced general words, from term to term, did you?
A. That was one of the changes in that contract.
X Q. 270. That was the big change, wasn't it?
A. I couldn't say positively. There may have been other minor changes; I don't recall.
X Q. 271. At the time you made this contract with the Magrane people you say the Houghton & Dutton people had your patterns, do you?
A. Yes; they had them in 1914; yes.
X Q. 272. Of course your knowledge of conditions in Boston made it clear to you that they in no way competed with the Magrane Houston Company, didn't it?
A. I don't know how far I would go with you on that.
X Q. 273. Wouldn't you substantially agree with me that, both as to location and character of goods sold, there was very little or no competition between those two stores?
A. No, I wouldn't go as far as that. I should say that there is competition between all the stores in the down-town section, more or less.

Mr. Sullivan: Is your Honor familiar with the locus here?
The Court: In a general way.

X Q. 274. You know that the Houghton & Dutton store can't be said to be in the dry goods section, don't you?
A. Yes.
X Q. 275. What?
A. Well, it depends. I have always regarded—I myself have always regarded the Houghton & Dutton Company as in-
73 cluded in the general down-town section of Boston, in the shopping centre.
X Q. 276. It is practically the last one on the north, isn't it?
A. Yes, practically the last one on the north.

X Q. 277. And it is a store that goes in for a much cheaper line than the Magrane Houston Company, do you think?

A. In my judgment, it caters to a cheaper trade.

X Q. 278. It has a creamery, and a grocery department and so on, and various other things of that sort in its establishment?

A. Quite so.

X Q. 279. It is quite a different sort of store, isn't it, to be fair about it?

A. It differs in the respects that you have mentioned.

X Q. 280. And in the general estimation in which it is held in the trade, in its standing, it is different?

A. The estimation of what trade?

X Q. 281. In your trade.

A. Yes, it is different.

X Q. 282. Now, the only other place that you had at the time that the Magrane Houston Company took the agency was a sales-room of your own?

A. Yes.

X Q. 283. Was that on the ground floor?

A. That was on the ground floor in Mr. Grosberg's store.

X Q. 284. In whose store?

A. Grosberg's.

X Q. 285. What number on Washington Street was that?

A. It was in the block there——

Mr. Sheehan: No. 484.

The Witness: There is one block there occupied by small stores, between Jordan & Marsh's store and R. H. White's, and it was in that block on that side of the street.

X Q. 286. And what kind of a store was it?

A. A specialty shop.

X Q. 287. A one-room store, was it?

A. Yes, a one-room store.

X Q. 288. Of course a very small store compared to this defendant's?

A. Yes; it was only perhaps fifty or sixty feet wide.

X Q. 289. Not in the same class at all, I suppose we can agree?

A. I don't know. They may have handled a number of lines that the Magrane Houston Company handled.

74 X Q. 290. Did they handle what are known as yard goods at all, to your knowledge?

A. I think not.

X Q. 291. I understand that one of the reasons why this contract was so valuable was because this defendant handled yard goods,—was that it?

A. That would make the connection a better one. I wouldn't say that it would be——

X Q. 292. Did you say that that was one of the reasons why it was of great value,—because they sold what you called piece goods?

A. I am trying to make a distinction——

X Q. 293. Did you say that?

A. Will you repeat the question?

X Q. 294. Did you say to Mr. Dodge that one of the reasons that made this contract of peculiar value—I think that was the word—was that this defendant sold a great deal of piece goods? The question is just did you say it?

A. Could you ask the stenographer to refresh my memory on the exact wording? It was something to that effect. If you want me to say that I used those precise words, I would like to refresh my memory on it.

X Q. 295. That was the idea that you meant to convey, wasn't it?

A. A place where piece goods are sold is a valuable connection for an agency; yes.

X Q. 296. And the Magrane Houston store was such a store, you said?

A. Yes; surely.

X Q. 297. And you said that the reason why Stearns did not have patterns was that they did not do that sort of business?

A. No; that they did not cater to people who made their own clothes to any great extent.

X Q. 298. Of course you know that Stearns does a much larger yard business, or piece business, than this defendant, don't you?

A. I don't know that that is so.

X Q. 299. Wasn't it part of your business to know about some of these details, in determining whether you should get patterns in there or not?

A. If you will refer to my testimony, you will get exactly what I knew, or claimed to know, about it in that regard. I say that I had it from the management of the Stearns store that they wouldn't handle patterns again.

X Q. 300. When was that?

A. Six years ago, probably.

75 X Q. 301. Now, I understand, as nearly as I can grasp it, Mr. Scanlon, that it is not advisable to have very many agencies in one locality, for the manufacturer or for the merchant; is that your idea?

A. That depends entirely on the capacity of the locality for developing a pattern business. In one community, for instance, one agency would be ample; in another community, five or six might be justifiable and be profitable.

X Q. 302. As a generalization is that true?

A. Repeat the question, please.

X Q. 303. That it is not advisable to have many agencies in the same locality?

A. Well, I can't admit that absolutely, because, as I say, it depends on the locality and the prospects of business in that locality.

X Q. 304. So that, suppose you could have agencies, as you call them, in all the stores in that down-town district of Boston, would it be advisable?

A. No; I wouldn't put agencies in all the stores; no.

X Q. 305. Then you don't want agencies in very many stores, do you?

A. Why, the thing is fixed clearly enough——

X Q. 306. In the same district.

A. In the same district, as I say, we want as many agencies as we can handle profitably for the business that that section yields.

X Q. 307. Well, sticking to this particular district, there is a limit to the number of stores there that you would want to put agencies into, isn't there?

A. If it is permissible for me to state this, I would say that three agencies in the down-town section of Boston would be all that any manufacturer would want.

X Q. 308. And somewhat scattered around?

A. That would depend.

X Q. 309. Is it an advantage to have them scattered? Can you generalize without giving your reasons?

A. No, because there are two factors that enter into the proper answer to that question.

X Q. 310. Then would it be advantageous to you to have more than one agency?

A. It would be advantageous to us.

X Q. 311. Conceivably you might do as much business in one as in two?

A. No; not in this situation.

76 X Q. 312. Have you looked up the R. H. White Company's business since we gave up our contract?

A. Yes.

X Q. 313. What?

A. Yes.

X Q. 314. Have you got the figures which show whether they have increased or decreased the business?

A. As compared with yours?

X Q. 315. No; as compared with what they were doing before we gave up the agency.

A. I haven't the figures just now, but I recall them in a general way, and I should say that for the first few months they were under the previous sales, and for the last month or two they were above; that is, they were gradually increasing their business.

X Q. 316. Have you the figures here which show what the R. H. White Company did as your agent from the beginning until now?

A. This year, do you mean?

X Q. 317. Yes.

A. No, I haven't got them with me.

X Q. 318. Can you tell us whether the R. H. White Company's sales increased when we gave up our agency?

A. Well, the R. H. White Company——

X Q. 319. No. Can you tell me, yes or no?

A. The R. H. White Company began only at about the time that the Magrane Houston Company gave up their agency. The R. H. White Company began June 1 and you quit July 7, so that I couldn't see any relation between them—the figures would not be important.

X Q. 320. Then the R. H. White agency was a substitution for the Magrane Houston agency?

A. No; in no sense.

X Q. 321. But it synchronized with the giving up of the other contract as an accident?

A. No.

X Q. 322. Well, did they have a pattern in there before you put yours in there?

A. Yes, sir.

X Q. 323. What pattern?

A. The Pictorial.

X Q. 324. Did they have a contract with them?

A. I suppose they did. I never saw it. I have been told they did by the general manager.

X Q. 325. That is all that you have been telling us about these other contracts, isn't it, what other people told you?

77 The Court: We will suspend here until two o'clock.

X Q. 326. Did you discontinue, Mr. Scanlon, the sales place that you had in Grosberg's when you took on the contract with the defendant?

A. Not immediately.

X Q. 327. How soon afterwards?

A. Some months afterwards, as I remember.

X Q. 328. How long, do you remember, definitely?

A. I wouldn't attempt to state it definitely, but I should say five or six months, perhaps.

X Q. 329. Have you any idea what the sales in the Grosberg place were?

A. My best recollection is that they were four or five thousand dollars a year.

X Q. 330. So that was it, under an agreement with the Magrane Houston people that you discontinued the Grosberg place?

A. No.

X Q. 331. Was it because you found that the Magrane Houston people could adequately supply your trade in that vicinity?

A. No.

X Q. 332. What?

A. No, it was not that.

X Q. 333. What was the reason?

A. Why, the reason was that the Grosberg arrangement carried a renewal from year to year, and at that time——

Mr. Noble: Of a lease, do you mean?

The Witness: Yes. My understanding was that the lease was renewed from year to year if we didn't terminate it, and we renewed it some time in the spring of the year, because I had every expectation at that time of putting our goods back into R. H. White's that summer.

X Q. 334. That is, the summer of two years ago?

A. Two years ago; yes. I guess it was the summer of 1915.

X Q. 335. So there was no relation of any kind between the ending of the Grosberg and the beginning of the Magrane arrangement?

A. None whatever, Mr. Sullivan.

X Q. 336. I noticed that when you came here today you didn't have figured what your past profits had been, did you?

A. On the Magrane Houston Company business?

X Q. 337. Yes.

A. No, I hadn't done so. I did it roughly.

78 X Q. 338. Have you got the memoranda here?

A. Yes, I think so.

X Q. 339. Will you let me see how you arrived at that?

A. It is in my little bag there. I have got it summarized on this. These are the memoranda [passing several papers to Mr. Sullivan]. The pages are arranged in sequence. This is the first page.

X Q. 340. Well, the net result on that page is merely to get at what your receipts would be?

A. The estimated sales and profits for the balance of the time.

X Q. 341. Take this page; I will call your attention to that. That memorandum finally evolved, down at the bottom, what your receipts would be, didn't it, your gross receipts?

A. What the gross receipts would be, or were, I think.

X Q. 342. Were; yes.

A. Yes. This shows our actual sales to have been $6,787.84.

X Q. 343. There is nothing on this sheet, then, to show how you arrived at your profits, other than your foundation for them by showing the receipts?

A. I have got the data here,—$6,787.84, at seven patterns to the dollar; 47,000; profit on each, 5½ cents per pattern.

X Q. 344. That is your standard profit on each pattern, your routine profit?

A. Yes.

X Q. 345. What does it sell at?

A. It sells at 15 cents retail, 7½ cents to the merchant, to the agent.

X Q. 346. The pattern sells at 7½ cents from you to the merchant?

A. Yes, sir.

X Q. 347. And all but two cents of that is profit?

A. Yes; in the ordinary case, such as this; yes.

X Q. 348. Well, what is it in the extraordinary case?

A. It might differ in the extent that you——

X Q. 349. Somebody would begin to owe you money besides the retail office, wouldn't they, pretty soon? You get all but two cents now in the ordinary case?

A. Yes, sir; that is on the patterns sold to the public, you understand.

X Q. 350. On all that are sold to the public?

79 A. Sold to the public; yes. There is an element of exchange, you understand, in the thing, too, that you must figure on.

X Q. 351. Well, how do you arrive at that 5½ cents, is what I would like to get at.

A. The average pattern was sold at 7½ cents, and the average cost of it, manufacturing cost, was two cents.

X Q. 352. The manufacturing cost of the patterns that are sold?

A. Yes; two cents.

X Q. 353. Of the patterns that are sold?

A. Yes; surely.

X Q. 354. That doesn't show to your stockholders, does it, a 5½ cent net profit on each pattern?

A. We have never made any statement in just that way, so much profit on each pattern; no.

X Q. 355. But do you mean to say to the court that you make 5½ cents on a pattern after taking out losses and everything else?

A. No; there is no overhead in that; that is taking out simply the manufacturing cost.

X Q. 356. Just the bare manufacturing cost?

A. The paper and the labor and the material that goes into the pattern itself.

X Q. 357. So that there is nothing else other than what you have enumerated in that two cents?

A. That is all,—what we call the factory cost.

X Q. 358. No office?

A. No office; no.

X Q. 359. Or legal, or any of the overhead charges at all?

A. None of the overhead.

X Q. 360. And that is the way that you figure all these profits, is it, past and prospective?

A. In this case?

X Q. 361. Yes.

A. Yes, sir.

X Q. 362. That is, you figure that the net profits—or the loss that you sustained by not having this contract carried out should be determined by the difference between the mere manufacturing cost and the selling price from you to the merchant?

A. That is my interpretation of how it should be figured.

X Q. 363. You don't make any allowance for any diminution in your other expense because you are not doing business with the Magrane Houston Company now?

A. I don't believe that there is any diminution or accretion
80 of expense because of the loss in our overhead—because of our not doing business with the Magrane Houston Company; practically, no.

X Q. 364. Without talking "practically" for the minute, technically and actually there should be, shouldn't there?

A. I don't think I could figure it out. The cessation of the Magrane Houston Company's business I shouldn't say represented a cent's worth of increase in the overhead to us. It would represent the non-use of so much paper, and the non-use of so much labor in making the patterns that the Magrane Houston Company would have sold. That was my basis.

X Q. 365. So that you haven't attempted to figure anything into the cost of the patterns that you would have sold us under your agreement, other than the factory cost?

A. The factory cost.

X Q. 366. That is all?

A. Yes, sir.

X Q. 367. Well, now, you say that you are thoroughly familiar with the business?

A. I have been twenty-eight years in it.

X Q. 368. Yes. And such familiarity as your position and years of experience give you, you concede that you have got, I suppose?

A. I admit that; yes.

X Q. 369. And you know, apparently, by repute at least, something about the other companies?

A. Yes, sir.

X Q. 370. And I understood you to say that competition was bitter?

A. In the pattern business?

X Q. 371. Yes.

A. I should say it was extremely bitter; yes, sir.

X Q. 372. And has been all along during the time of the existence of this contract?

A. Yes; quite so.

X Q. 373. Substantially the same situation has existed?

A. Yes.

X Q. 374. And does now?

A. Yes; quite so.

X Q. 375. Well, you figure a good deal by per cents, I suppose, as a business man, in estimating your profit?

A. I don't know that I followed you with reference to that.

X Q. 376. You figure upon a percentage basis a good deal, don't you?

A. Percentage how? Will you make it clearer?

X Q. 377. Can't you tell, for instance, what percentage of the amount sold by you to a customer is profit?

A. To a given particular customer, you mean?

81 X Q. 378. Well, was there anything odd or unique about the Magrane Houston contract?

A. Nothing at all.

X Q. 379. I understood that it was routine?

A. Absolutely; yes, sir.

X Q. 380. And the conditions were routine attending its carrying out, weren't they?

A. Absolutely.

X Q. 381. Now, can't you tell, in the carrying on of your business, what a gross sale of three or four thousand dollars' worth of patterns would net you in profits, in percentage?

A. Not absolutely, because it is affected very materially by the extent of the exchanges.

X Q. 382. Well, you mean because they return things to you?

A. Yes.

X Q. 383. And that cuts down the profits?

A. May I illustrate? For instance, if we send a pattern to a merchant, sell it to him at a price of 7½ cents, and he does not sell it, he returns it to us at a loss of a fraction of a cent, and we replace that pattern, so that for the second pattern, instead of getting 7½ cents we get a fraction of a cent, and if he does not succeed in selling that pattern we exchange it, so that we may have supplied three patterns in a given case for 8½ cents. The element of the exchange has a

vital bearing on the profits in any given case, so that we would have to take the exact figures in each case and see what our sales were and what the ratio of the exchange was.

X Q. 384. Can't you tell the court, for instance, when there are $3,200 of sales to this company, what your percentage of profit was?

A. Thirty-two hundred? That is the amount that we received from the Magrane Houston Company?

X Q. 385. Yes. Well, without doing it, if I don't interrupt, I want to know if there was not a rule in your business, as a result of all these years of experience—didn't you have some idea that you could give the court of the percentage of the selling price that would be net profit,—some handy rule?

A. No; we had no such rule, Mr. Sullivan.

X Q. 386. Have you the percentage that the overhead would be, and the other elements of cost in a 7½-cent pattern, besides the factory?

A. No, I haven't anything accurate.

82 X Q. 387. How is it that you are accurate about the factory? Because it is easier?

A. Because it is easier. So many patterns come out of a ream of paper, and you know what it costs to cut them and fold them and put them together.

X Q. 388. That has been determined?

A. That has been a matter of exact determination.

X Q. 389. Do you mean to say that your business has been conducted without any definite understanding among those in authority as to what the percentage of profit on the sales is?

A. Yes; that is quite so.

X Q. 390. Well, is it because there is not any?

A. I don't know that it is because there is not any. There may be some basis for it.

X Q. 391. Have you been making money?

A. We have made quite a little money.

X Q. 392. Have you been affected adversely by the conditions that you have adverted to with reference to prices?

A. War conditions, do you mean?

X Q. 393. Yes.

A. Oh, yes, very seriously.

X Q. 394. Has that cut down your profits?

A. I would say that it has up to date. The thing is in a state of transition just now.

X Q. 395. Now, then, isn't there any way that you can tell the court, without my putting in too much time on this, what the percentage that you earn on your sales is?

A. You see, Mr. Sullivan,——

X Q. 396. Just tell me if there is not some way.

A. I don't know of any. I wouldn't know how to distribute the overhead, because of the publications, as well as the patterns, entering into it, you see.

X Q. 397. You are president and a director?

A. Yes, sir.

X Q. 398. You have to decide at some stage what you will let the stockholders in on, don't you?

A. What?

X Q. 399. How much will you let the stockholders in on the profits,—don't you have to decide that?

A. How much we will let them in on *them*?

83 X Q. 400. Yes.

A. Exactly what do you mean?

X Q. 401. How much dividends you will give them.

A. Oh, that is done by the directors, not by me alone.

X Q. 402. You are a director?

A. Yes.

X Q. 403. And the chief director at the meetings?

A. Yes, sir.

X Q. 404. Don't you have to decide what the profit has been?

A. Yes.

X Q. 405. Don't the bookkeepers furnish you with a statement of what ratio that bears to sales?

A. No, nothing precisely of that nature.

X Q. 406. Do you mean to say that you don't have a statement that shows that?.

A. Nothing that shows the percentage, the ratio of profits to sales.

X Q. 407. Haven't you any idea of the ratio of profits, so that we could use it as a standard?

A. I have not, Mr. Sullivan.

X Q. 408. You would concede, I take it, that the McCall people have as good an organization as yours for making money?

A. I should have no objection to conceding that.

X Q. 409. Their business, you say, is practically identical with yours?

A. Larger, I said.

X Q. 410. Larger; but I mean in character.

A. Yes, much the same.

X Q. 411. Much the same. You wouldn't expect to find any great variation between their percentage of profits and yours?

A. Yes, I would.

X Q. 412. The competition that you have said is so bitter to a certain extent takes care of the margin of profits, doesn't it? That is possible?

A. The competition, speaking from my standpoint, does not take care of the marginal profits. I think that it disrupts the margin of profits considerably.

X Q. 413. Well, I didn't mean that it conserved them at all, but I meant that it took care of how much you could get; it kept down the margin of profit, didn't it?

A. Oh, competition affects that; yes.

X Q. 414. And you were each competing with the other?

A. Yes.

84 X Q. 415. And competing especially on price?

A. Price to the merchant, or the retail price?

X Q. 416. To the merchant.

A. Yes.

X Q. 417. So that we might expect to find considerable identity of price between the two concerns?

A. Sales price?

X Q. 418. Yes.

A. Yes, that is so.

X Q. 419. Isn't it well known to you and to the trade at large that no pattern company can figure over 10 per cent as profit on what it sells?

A. No, that is not known to me.

X Q. 420. What?

A. That is not known to me.

X Q. 421. You have some knowledge on the subject, haven't you, of what competitors are probably making?

A. Yes; I have seen the statement that the McCall Company averaged to take out of their business $600,000 a year for five years, which I should say is vastly more than 10 per cent.

X Q. 422. You have to make up reports to the State?

A. Yes.

X Q. 423. And you make up your gross sales?

A. Yes.

X Q. 424. And show your net profits?

A. Yes.

X Q. 425. It can't be that the ratio between those two has escaped your attention?

A. The ratio between what?

X Q. 426. Between your profits and gross sales for the year.

A. I haven't anything sufficiently in my mind to enable me to make any statement on that.

X Q. 427. Didn't it occur to you that you would probably be asked some such series of questions as those which I have asked?

A. It did not.

X Q. 428. Didn't it occur to you that that might be a fair way to charge up to this defendant what you had lost if it turned out that you had lost anything?

A. No, it did not. This occurred to me to be the fair way to figure it.

X Q. 429. But you hadn't done even that until you got here?

A. I haven't figured the profit on what they had sold. I figured the profit on what they would have sold.

X Q. 430. How did you get at it except on the basis of experience?

85 A. This was simple. I took the actual cost of the patterns, the actual cost of the paper, the printing of the fashion sheets, and so on—it was very simple.

X Q. 431. Last year what were your sales?

A. Something over a million dollars.

X Q. 432. That is, what the merchants returned to you, I mean.

A. Those were the total sales, including pattern receipts, publication recepits, and everything.

X Q. 433. That was the cash returned to you?

A. Returned to us.

X Q. 434. Now, what were your profits?

A. We made no profits last year.

X Q. 435. That was lucky. That was 1916?

A. 1916.

X Q. 436. But you still think that there was a profit in the Magrane Houston agency last year?

A. Last year; yes, I should say there was a profit in the Magrane Houston Company agency individually; yes.

X Q. 437. Were you a loser last year?

A. We lost a little money last year.

X Q. 438. Was that due to any causes that entered into the dealings with the Magrane Houston Company,—the cost of materials, for instance?

A. Well, the cost of materials—there was a rising market on materials last year, a very considerable rising market, and we didn't get an opportunity to adjust our prices to the new conditions until the year was fairly well along.

X Q. 439. You wouldn't have an opportunity to adjust your prices to the Magrane Houston Company agency until 1919, on your theory, would you?

A. Yes, we would, because we get a percentage of the retail sales, so that if we made the retail prices, as we have done, higher than they had been, we would get a larger amount on each pattern sold.

X Q. 440. So that you had agreed——

A. They had agreed to that. They were to pay us 50 per cent of the retail price, and we raised the price from fourteen cents up to twenty cents.

X Q. 441. And I suppose you ascribed the cause to the war largely?

A. Well, the war seems to have been the thing that has been used to give color to all the increases in prices.

86 X Q. 442. Now, did you squeeze in a little profit there for yourself while you were marking it up?

A. For myself personally?

X Q. 443. No; the company.

A. No. I say we lost money last year.

X Q. 444. So that the additional price that you put on it didn't give you any greater profit than you had been getting before?

A. Why, it did so far as it operated last year, but I tried to explain to you that we didn't increase the prices until along in the fall of last year.

X Q. 445. You only took care of yourselves for the extra expenses that you were put to; isn't that true?

A. No; we meant to do a little more than that.

X Q. 446. That is, in the war expense there is little for the company?

A. We tried to fix it so that if we would take care of any known increase, and we would take the actual increase as a minimum.

X Q. 447. Now, this contract with the Magrane Houston Com-

pany, figuring it roughly, was more than two-thirds profits,—more than two-thirds; is that your story?

A. Let us see. Our income was six thousand; our total sales were——

X Q. 448. May I ask you this——

A. Yes, sir.

X Q. 449. Or you may finish your answer first.

A. Mr. Sullivan, we appear to have supplied altogether to them, or to have received from them $9,746.03; and I think I have figured our profits at $3,481; is that correct?

X Q. 450. Yes, if that is right; is it?

A. Yes, I think that that is quite right. Eliminating the exchange there was about $8,000, and it was probably about $3,400 roughly.

X Q. 451. Well, I was interested, Mr. Scanlon, in regard to the item of $3,200 as your net return for patterns alone. Isn't there such an item?

A. $3,200?

X. Q. 452. No, that is not it.

A. $2,612 was the profit on the pattern sales.

X. Q. 453. Profit?

A. Yes. And those patterns cost us—that figures, Mr. Sullivan, 47,509 individual patterns, and I figured their cost to be at two cents apiece, $950.

87 X Q. 454. I took you down this morning as saying on that $6,443 at retail, the estimated profits. Now, later you said one-half is our share, $3,221.50?

A. Yes.

X Q. 455. And then you said these will cost us $600.

A. Thirty-two thousand patterns——

Mr. Sheehan: You are asking Mr. Scanlon——

The Witness: I have got that, Mr. Sheehan.

Mr. Sheehan: You asked him what they had supplied.

The Witness: I have got it now.

X Q. 456. Your estimation for the court was that they would pay you theoretically $3,221.50?

A. Yes, sir.

X Q. 457. And that the patterns cost you $600?

A. That $3,221.50 represents——

X Q. 458. No. Is that right?

A. That figure is $644.28 to be exact.

X Q. 459. So that when I said that it represented two-thirds of the profits I was correct, wasn't I? $2,587.22 you want the court, as I understand it, to find would be the profit to you out of $3,221.50?

A. Exactly.

X Q. 460. And still you made no money last year?

A. We made no money last year; no.

X Q. 461. Now, can't you think, from your acquaintance with the trade, of any rule or opinion in the trade as to what the average profit is in percentage on sales of goods——

Mr. Dodge: Just a moment. Is it necessary to go into that any

further? It is obvious, and the witness has stated over and over again, that he did not take into consideration the element of office expenses or overhead expenses, which he says were not increased, or decreased, or affected at all, by the performance or non-performance of this contract. If his method of figuring the profit is wrong, that is so much the worse for our evidence; but he obviously is not getting anywhere by asking what the percentage of profit to sales in other businesses is, where of course, we are dealing with the business as a whole, are including overhead and all items of expense. We have not done that here. He says that 5½ cents out of 7½ cents is what they make on the individual pattern contract, not
88 including the overhead, on that of the patterns which are sold to the customers and do not come back by way of exchange. On the patterns that come back by way of exchange there is, of course, a loss.

Mr. Sullivan: But suppose that his Honor should not feel that that was the proper way to adopt in estimating the profits. If I can show some other way, which the court may adopt, haven't I a right to do so?

Mr. Dodge: Yes.

The Court: But you are inquiring now, Mr. Sullivan, are you not, as to the usage or practice of other——

Mr. Sullivan: Merely on cross-examination to test the witness.

The Court: The question of what other concerns may do, how will that assist us here?

Mr. Sullivan: I don't know, but having established that they were identical in kind and management——

The Court: There are so many elements entering into it that I do not think that it would help me,—business management, etc. The conditions would be so different, it seems to me, that it would be entirely inadmissible.

Mr. Dodge: Our percentage, the witness says, was something less than zero last year.

Mr. Sullivan: Perhaps it will be a benefit to you if we don't trade with you for a couple of years, if you are going behind that way.

X Q. 462. Do you wish to leave it, Mr. Scanlon, with the court that you have no way, from your experience, or your usage in your own business, of assisting us with reference to what the percentage of profit is figured to be, or attempted to be figured to be?

A. I have no way, Mr. Sullivan; no.

X Q. 463. You concede such an ignorance as is somewhat unusual for one of your experience?

A. I shouldn't say it was ignorance, to begin with.

X Q. 464. What?

A. I shouldn't say it was ignorance, to begin with.

X Q. 465. I am not critical; I merely use the word as a statement of fact. You are ignorant of it, aren't you?

A. Of what?

89 X Q. 466. Ignorant of what the percentage of profit is figured to be.

A. I don't know that it has ever been figured by anybody.

X Q. 467. Then, in your own business, there has never been any figuring by any of your people, the ones who estimate, for instance, what it costs to cut paper, and all that sort of thing, until they get it down to two cents a pattern—it is true, isn't it, that there is such an expert with you?

A. Yes.

X Q. 468. Nobody has ever gone on and figured what the ratio should be for overhead and all that?

A. No. On the contrary, if I may say so, our accountants——

X Q. 469. You have answered me, nobody?

A. Yes.

X Q. 470. And all these profits which you have detailed to his Honor before the adjournment are simply arrived at by hitting on the plan of multiplying 5½ cents by the number of patterns that you think they might sell, if they are lucky?

A. If you put it that way.

X Q. 471. And have you, in making up your mind what the probabilities of sale are, taken into account anything else than their past history with you?

A. No. That was the basis.

X Q. 472. That was the only basis, was it?

A. Yes, sir.

X Q. 473. Have you, for instance, gone over their history to see whether they were increasing or decreasing?

A. I haven't particularly done that; no.

X Q. 474. Did you know that they were decreasing monthly?

A. No, I didn't know that.

X Q. 475. What?

A. I didn't know that, but it wouldn't surprise me now if it had been the case recently.

X Q. 476. If that were true, that would rather affect the probabilities of their keeping up, wouldn't it?

A. No, it would not. They might change their methods, and would then increase their business.

X Q. 477. A lot of things might happen by which they would double their business.

A. I was figuring on the probabilities.

X Q. 478. And a lot of things might happen as the result of which they would not do half as much?

A. That is so.

X Q. 479. And it is all speculative, isn't it?

A. Yes.

90 X Q. 480. And one of the reasons why you want an injunction is because it is so speculative that you can't ascertain it? Who swore to the bill? You knew that the thing was speculative, didn't you?

A. Of course; yes.

X Q. 481. And have you taken into account, for instance, the probability that the R. H. White Company will get some of this business?

A. I have allowed for that.

X Q. 482. What allowance have you made for that?

A. That they would get none.

X Q. 483. The name "Standard Patterns" I understood from what you said to counsel is a valuable name?

A. It is; yes, sir.

X Q. 484. And if it is valued it must be because people have come to know of the good qualities of the product; is that not it?

A. Quite so.

X Q. 485. And if they know that, I assume that you meant that they would go wherever the Standard was?

A. To a certain extent, that is true.

X Q. 486. That is the ordinary good-will definition,—the probability that they will resort to the place where the Standard is. And if it has such pulling power, don't you think that some people might walk across the street to get it?

A. If I may elaborate my conclusion——

X Q. 487. No; I don't like your elaboration. Pardon me.

A. I can quite understand that; yes.

X Q. 488. You say yes, do you?

A. I don't know. Repeat your question, please.

X Q. 489. I say, if all those premises are true with reference to its value as a drawing card, isn't it probable that many of the former customers of the Magrane Houston people will walk across the street and buy your patterns?

A. I shouldn't say it is highly probable; no.

X Q. 490. Why not?

A. Because they would have an opportunity to buy another pattern in the Magrane Houston store, which presumably would be urged upon them as being as good a pattern as ours, if not a better pattern.

X Q. 491. Successfully urged?

A. Quite so.

91 X Q. 492. You are giving the drawing power of your own pattern all the worst of it in adopting that premise, aren't you?

A. No, I think not.

X Q. 493. Was there any other store near there that had the Standard patterns at that time, at the time that you told us——

A. At the time that we made our arrangement with the Magrane Houston Company?

X Q. 494. Yes.

A. Yes; Houghton & Dutton.

X Q. 495. So that for a couple of years, or nearly that, the Magrane Houston store was the only place in that district where you could get Standard patterns?

A. Yes.

X Q. 496. Then the R. H. White Company got going about a month before the Magrane Houston Company gave up?

A. Yes.

X Q. 497. And you would concede that the R. H. White Company store is just as attractive a store as Magrane's to the public, wouldn't you?

A. Yes, I think it is.

X Q. 498. A store, as his Honor doubtless knows, of long standing and high reputation in the community?

A. I think so.

X Q. 499. And of course it does more business than Magrane's, attracts more people to all its departments?

A. That I can't say.

X Q. 500. Are they right across the street from Magrane's or a little ways down the street?

A. I should say diagonally across.

X Q. 501. Of course you took all proper and reasonable steps to inform the public where they could get your product?

A. We took our customary steps.

X Q. 502. What are those?

A. An announcement on the fashion sheets.

X Q. 503. On the fashion sheets?

A. Yes.

X Q. 504. Well, didn't you advertise at all?

A. No.

X Q. 505. Did you take any steps to inform the public that formerly bought at Magrane's that they could go across the street and get the patterns at White's?

A. No. I think that the R. H. White Company made some such announcement in their advertisements. We took no such steps.

X Q. 506. That is, they carried it in their ad.?

A. I believe they did.

92 X Q. 507. Now, what relation does the amount of sales that you have been making in that district bear at the present time to what it was when you had the Magrane store?

A. The sales in the White store now?

X Q. 508. Yes.

A. As against the Magrane?

X Q. 509. Yes.

A. I should say that White is doing substantially more than Magrane did.

X Q. 510. So that you are now actually selling more of your product in that district than you were before Magrane abandoned his contract?

A. Than we did before Magrane abandoned it; yes; while Magrane had it exclusively there.

X Q. 511. Yes. In spite of the fact that the industry has been laboring under rather adverse conditions, hasn't it?

A. You mean in the matter of increasing costs?

X Q. 512. Yes.

A. Yes, that is so.

X Q. 513. And I suppose that the public that use patterns are affected in their purchases by increased cost, aren't they?

A. Affected?

X Q. 514. The number of patterns falls off, naturally?

A. I think that is true, temporarily.

X Q. 515. But, in spite of that, you are selling more patterns,—in spite of all these adverse conditions, which you know of, and I

don't, you are still selling more patterns in that immediate district than you did when Magrane was the sole agent?

A. White is selling more than Magrane; yes.

X Q. 516. Have you sized up White's sales to try to get trace of what percentage of them is due to sales to Magrane's former customers?

A. No.

X Q. 517. Is it possible to do that?

A. I don't know of any way in which I could reach a satisfactory conclusion on that.

X Q. 518. So that, as a matter of fact, anybody trying to estimate damages honestly for the loss of the sales of your product in the Magrane store would be apt to be very much disturbed, wouldn't he, about how much of it was going over to White's, so that you were still getting the benefit of it?

A. Not in my position; he would not have to be disturbed.

93 X Q. 519. No, of course; in your position you want to ignore White's, don't you?

A. No; I should give full value to Magrane Houston and not ignore White,—not ignore any consideration.

X Q. 520. Have you given thought to White's?

A. I have; surely.

X Q. 521. And have been unable to place it,—you have been unable to attach any figure to the possible business that went from this defendant's store to White's?

A. I haven't made the attempt. I am not unable to. I haven't made the attempt.

X Q. 522. And you have omitted to make the attempt because you were conscious that it was impossible?

A. No.

X Q. 523. Is that the reason?

A. Not altogether; no.

X Q. 524. Of course you wouldn't expect to get Magrane's customers into White's and get the benefit of their purchases, and still get from Magrane damages for the loss of the same customers, would you?

A. I don't understand that.

X Q. 525. You don't expect the court to give you compensation for the loss of the sale of your patterns through Magrane if the same customers go over to White and buy them, do you?

A. I wouldn't expect it under those conditions; no.

X Q. 526. And, not expecting it, haven't you attempted to get at the facts with regard to that? Have you been to White's?

A. No, because I am satisfied that that is not a statement of the actual condition.

X Q. 527. Your satisfaction is arrived at how?

A. By knowing that when the R. H. White Company was selling $15,000 of our goods a year, some years ago, they were selling in Houghton & Dutton's store at the same time seven or eight thousand dollars' worth, and I should expect the Magrane Houston Company

to maintain their business in spite of White's having an agency and, in fact, I should expect them to increase it.

X Q. 528. Did the R. H. White Company have the Standard patterns years ago?

A. Yes, twelve or thirteen years ago.

X Q. 529. Did the R. H. White Company have the agency then?

A. We had a department in White's.

X Q. 530. So that White was not selling it as an incident,
94 as he is now, but your organization was pushing it; that is the fact, isn't it?

A. Our sales girls.

X Q. 531. Now, I would like to be sure as to your attitude in regard to the desirability of having a limited number of agencies. I understood you, as a generalization, to say that it was desirable not to have too many agencies; is that true?

A. Not exactly. My statement was that the number has a very fixed and definite relation to the possibilities of the pattern business in that section.

X Q. 532. And you think that two were about right?

A. In Boston?

X Q. 533. Yes, in that part.

A. I would rather have three, but I would be fairly satisfied with two. I would rather have three in the down-town section of Boston, but I would be fairly satisfied with two.

X Q. 534. You realized, of course, in signing this contract, that the Magrane people bound themselves not to take anyone else's patterns?

A. That is right.

X Q. 535. That was an important thing in your mind, I suppose?

A. By anyone else you mean another pattern?

X Q. 536. Yes.

A. Yes.

X Q. 537. And if you could succeed in doing that at each store there wouldn't be any question about your monopoly, would there?

A. If we could succeed?

X Q. 538. Yes.

A. We never made the attempt, so that there couldn't be any question about it.

X Q. 539. You concede that the inevitable result of going around and getting the stores to sign this sort of a contract would be to eliminate everybody else?

A. If you could make that sort of a contract with every store, that would eliminate everybody else: yes.

X Q. 540. So that it does tend, you concede, to giving a monopoly?

A. I don't concede that at all.

X Q. 541. It gave you a monopoly on that corner and on White's corner, didn't it?

A. As a matter of fact, it has not, because in spite of the contract the Magrane Houston Company undertook to carry another pattern.

X Q. 542. Well, I am talking about what they could right-
95 fully do as you claim. So far as they could rightfully do it, as you claim, you had a monopoly of the Standard patterns?

A. Yes, in those two stores.

X Q. 543. Now, apparently White's man and you had some talk about the desirability to the merchant of not having more agents compete?

A. Yes, that is right; we had.

X Q. 544. And you, at the time you had that talk, knew that the Magrane people were going to get through?

A. No; I did not. I figured on their being our agents for another two years at least.

X Q. 545. Was that agreement with the R. H. White Company, binding you not to allow anyone to compete, made before June, do you think?

A. Oh, yes; it was made in February. I gave you the date this morning.

X Q. 546. But, as I understood before lunch, you didn't know, and you did not communicate to White's people, the fact that Magrane acted as though he was going to get through?

A. No; on the contrary, I knew nothing about Magrane.

X Q. 547. So that, as I understand your position, you were not guaranteeing White an exclusive agency?

A. Oh, no.

X Q. 548. But it was exclusive as to everybody except Magrane, I understood you to say?

A. Yes.

Mr. Dodge: Within a quarter of a mile.

The Witness: Yes.

X Q. 549. Well, that would exclude Jordan's and Bacon's and Stearns' stores, and exclude everybody that competed in the trade, you say?

A. Except Magrane and Houston. That is quite true.

X Q. 550. Was that at the same price, or was there a different price paid for that?

A. No; that was the same contract.

X Q. 551. You never had any talk with Magrane at all, as I recall it now?

A. I have in past years, but not about this matter.

X Q. 552. Can you give me the figures, did you have them taken off, of White's sales?

A. I haven't got them. I saw them. I had them over in New York.

X Q. 553. You had them made there?

A. Some time ago I wrote Mr. Marsh to see if he could get
96 the sales, and I think he got them and sent them over to me.

X Q. 554. So that I suppose you had in mind that you would like to know whether their size indicated that any of Magrane's customers were going to them?

A. No; it had no relation to the Magrane Houston situation at all. To tell you honestly, I wanted to see how they compared with the sales of the Pictorial pattern, which was on sale there before.

X Q. 555. You wouldn't think that it was an unusual thing if

customers now should come into Magrane's and ask for Standard patterns, would you?

A. I shouldn't think that that would be unusual.

X Q. 556. You would rather think, from the wide reputation of your house, or your product, that they would do that?

A. They might do it very readily.

X Q. 557. That is one of the things that you complain of, isn't it, that they do that, and that they are diverted?

A. I rather imagine that they are diverted; yes.

X Q. 558. If you found, for instance, that they were sent over to White's, would that affect your opinion as to the amount of damages that you ought to get?

A. I might be interested in that statement if I could be assured that that was made known upon their inquiry for a Standard pattern.

X Q. 559. So that in estimating your damages for the next two years you have estimated not merely your hopes but your fears, haven't you?

A. I don't quite follow that.

X Q. 560. You have charged up damages on the theory that the Magrane Houston Company would seek to divert any customer that came in for the Standard patterns to the McCall, haven't you?

A. I rather imagined that they would do that.

X Q. 561. And you have computed your profits on that basis?

A. Candidly, I don't see any connection between that and the conclusion that you are reaching. I have no reason to anticipate that they wouldn't do as much business, and I have reason to believe that they would do more even, with the White agency going, and my calculation is made entirely on that basis.

97 X Q. 562. I think that you were permitted to say this morning that it was understood in the trade that all the contracts had this provision, the contracts of your rivals, about doing business in only one kind of a pattern at a time in a store?

A. Yes that is the custom of the trade, the general custom.

X Q. 563. Is that in the McCall contract?

A. That is in the McCall contract.

X Q. 564. You are sure of that?

A. Quite sure, unless they use some special form occasionally that I don't see; but their usual form has that.

X Q. 565. And I understood you to go at some length into the danger of injury to business on all sides,—to the public, to the manufacturer and to the agent,—from having more than one?

A. Yes.

X Q. 566. Well, isn't that like some of the conventions in other walks, when we attempt to change them? I understand that you have got no basis at all in actual experience for knowing what the effect would be, have you?

A. Why, the thing seems to me to be——

X Q. 567. Seems to you, but I understood you to say that never in twenty-eight years had you known of two kinds of patterns being sold by the same agency?

A. No, I didn't say that. I distinctly said that I had known of it in several cases.

X Q. 568. Where, for instance?

A. Marshall Field of Chicago, I think, is handling two kinds.

X Q. 569. Now?

A. Yes.

X Q. 570. We need not argue about their standing as a merchant house, I suppose?

A. No. And I admit that any merchant who could get the patterns on the same terms would be wise to handle them.

X Q. 571. That is, you would admit that any merchant like Magrane, if he can get two makes of patterns, would be wise to get them?

A. If he can get them on the terms that Marshall Field gets them, I think so; yes; I think there would be money in it.

X Q. 572. So that, conceivably, there are cases in existence where it would be profitable for the merchant to have two?

A. Yes.

X Q. 573. So that you didn't mean to say this morning that
98 it was fundamentally a wrong way to do business?

A. I did mean to say that it was fundamentally a wrong way to do business.

X Q. 574. For the manufacturer?

A. And for the merchant.

X Q. 575. Unless he got them on good terms?

A. Unless he got them on good terms.

X Q. 576. Who else does that?

A. Bamberg's store, in Newark.

X Q. 577. A big store?

A. Yes. And maybe half a dozen that I have heard of at one time and another throughout the country.

X Q. 578. It is solely a question, isn't it, of its not being desirable for the manufacturer?

A. It is not desirable for the manufacturer.

X Q. 579. And the manufacturer controls the whole situation, fixes the selling price and fixes the thing generally?

A. Control?

X Q. 580. Yes; they have the control, haven't they?

A. No. They determine the basis on which they find it most advantageous to do business.

X Q. 581. And there is rather a striking uniformity among the manufacturers as to that, isn't there,—the contracts bear a close resemblance to each other?

A. In some particulars. In some particulars it is the reverse.

X Q. 582. In what particulars are they alike?

A. In the retail prices of the patterns and the discount to the agency.

X Q. 583. Yes. That is uniform, is it?

A. Yes.

X Q. 584. In all the contracts?

A. Yes, sir.

X Q. 585. And you wouldn't give a Standard agency on any other basis, would you?

A. No.

X Q. 586. And in all your six thousand agencies you use this stock form of contract?

A. Yes.

X Q. 587. And the McCall Company has a common form of contract embodying those two terms, doesn't it?

A. They have quite a few terms.

X Q. 588. So that they give quite a few concessions?

A. Quite a few concessions.

X Q. 589. They let other patterns be carried in their stores?

A. Only occasionally.

X Q. 590. They agree not to compete with the man that
99 they are fixing the price for, and tie up a man the way the Magrane Company was tied up here?

A. You have got an illustration here in Boston of the fact that they won't.

X Q. 591. I am asking you generally?

A. No, they don't.

X Q. 592. Then they do conform pretty closely to the regular contract form?

A. Oh, yes, their usual contract is very much like ours, except in one important particular.

X Q. 593. The result of this contract making is that you tie the merchant up, but he doesn't tie you up to guarantee him the benefits of the sale of your patterns, does he? Is that your uniform practice?

A. Our uniform practice is to give to the merchant——

X Q. 594. Is that it,—that you bind him not to take on any other pattern, and you reserve the right, tacitly or otherwise, to sell to his rival right across the street?

A. We usually reserve that right; yes.

X Q. 595. Usually do?

A. Yes, quite usually; yes.

X Q. 596. So that, although he couldn't enjoin you, you feel, from giving the patterns to the man across the street, you could prevent the manufacturer across the street from supplying him with patterns?

A. How is that?

X Q. 597. You won't let anybody else into his store with patterns, will you?

A. No; he agreed to that.

X Q. 598. And anybody may sell your patterns all round him, as far as he is concerned?

A. We reserve that right, but that is not the practice by any means.

X Q. 599. Then this was a variation of your practice, was it, to give them to White?

A. Oh, no, no.

X Q. 600. A regular thing?

A. A regular thing as far as it goes, yes, and to the extent that it went here.

X Q. 601. Now, you said to his Honor this morning that there was no opportunity to get any other firm to take this on, as I understood you?

A. Yes, sir.

X Q. 602. And that is based on your personal knowledge of their contracts, isn't it?

A. Largely by personal knowledge, direct, and for the rest of it, from the reports of our representatives whom I had investigate it.

100 X Q. 603. Well, it would be very unusual to be able to take anyone on at any particular time, anyway,—they are all signed up, aren't they?

A. They are all signed up; yes.

X Q. 604. But the contracts are expiring and being renewed all the time?

A. Yes.

X Q. 605. Does Jordan, for instance, have patterns?

A. Yes.

X Q. 606. What has he got?

A. The Pictorial.

X Q. 607. Do you know when his contract expires?

A. It has, to the best of my information, about three years to run; something over two years.

X Q. 608. What?

A. Something over two years, is my information on that.

X Q. 609. From now?

A. Yes.

X Q. 610. And you have, then, either personally or through your agents, been to all of these concerns in that vicinity?

A. I think we have been to every one of them.

X Q. 611. In that vicinity?

A. Yes, in the down-town section.

X Q. 612. So that you have limited your efforts to that vicinity entirely, haven't you?

A. Yes.

X Q. 613. You haven't been to stores anywhere up near Houghton & Dutton's, or anywhere like that?

A. No.

X Q. 614. No, because they are not competitive stores; they wouldn't take care of the trade that you would get at White's, would they?

A. Well, when you get that far away, you may have many reasons enter into it. I couldn't answer for that.

X Q. 615. Now, you call it an agency?

A. Yes.

X Q. 616. Do they buy the patterns?

A. In a sense they buy them. It is not an outright sale.

X Q. 617. Is there any restriction in their ownership of them that you know of.

A. Oh, yes, great restriction.

X Q 618. What are they?

A. They are obliged, as a contract matter, to return a pattern to us if they don't sell it.

X Q 619. Is that an obligation or a boon that you confer on them?

A. From the agent's standpoint it is a boon, I should say. In our case, I should say that is is an obligation.

X Q. 620. Well, you put a stop order on them, of course,
101 as to when they may return it; they have to do it, for instance, within two weeks, don't they, after the time expires?

A. We limit their exchanging privileges to January and February, and to July and August, each year.

X Q. 621. And if they will comply with certain conditions, then you will buy the patterns back; that is about it?

A. Yes.

X Q. 622. Is the risk on them all the time, do you understand?

A. Why, I should say that the greatest risk is on us.

X Q. 623. No; but in the case of fire, for instance, do they own them in that sense?

A. If they lose them they have to replace them; yes.

X Q. 624. And if you take them back you charge them something for the privilege?

A. Ten per cent.

X Q. 625: And at the termination of the contract, when you take them back you charge them 25 per cent?

A. Twenty-five per cent.

X Q. 626. So that it is really a mere matter of what you call it, whether it is an agency or a sale, isn't it?

A. Well, I should call that an agency, very clearly.

X Q. 627. Well, did you have those words put in there because you thought that it might affect the legal situation a little?

A. Those words have been in the contract for years; not with any special reference to any special law.

X Q. 628. But, as I get you, you sell the product to them. If it is burned or lost or destroyed, it is their loss——

A. Yes.

X Q. 629. —provided they make application within certain periods, you will buy them back at nine-tenths of what they pay?

A. Twice a year; yes. I think your understanding is correct on that.

X Q. 630. And you don't pay the help anything there?

A. No.

X Q. 631. They run it themselves?

A. You are speaking of——

X Q. 632. The defendant here runs it himself?

A. Yes.

X Q. 633. And all that he gets is your product?

A. That is the idea, and the service.

X Q. 634. Well, have you noticed any falling off in the subscriptions to your magazine?

A. No, no great change in the subscriptions to our magazines; no.

102 X Q. 635. You are getting about as many from White as you got from us?

A. I haven't checked that up particularly, as a matter of fact.

X Q. 636. Well, you wouldn't argue, would you,—of course you don't argue, but you wouldn't say, would you, that because White took the agency, if he and Magrane had kept on there would be twice as many subscriptions to a book like the Designer?

A. Twice as many? I would say there would be three times as many.

X Q. 637. Well, some of them that Magrane took are now being filled by White, aren't they?

A. Why, I am not sure about that, Mr. Sullivan.

X Q. 638. Now, I noticed that your incorporation was rather a modest one, if I looked at it right. $25,000, wasn't it?

A. Capital stock?

X Q. 639. Yes.

A. $75,000.

Mr. Dodge: It has been increased since then. I put in the original.

X Q. 640. Does your present concern represent any consolidations?

A. The Standard Fashion Company?

X Q. 641. Yes. Have you taken over any other concern?

A. No.

X Q. 642. The control of any other concern in the pattern business?

A. No.

X Q. 643. The Butterick, do you control that, under any lease, working arrangement, or anything?

A. Nothing at all.

X Q. 644. You are two distinct concerns, in other words?

A. Absolutely, from the ground up.

X Q. 645. Well, is it a fact that the biggest dividend that you ever paid was four per cent on the preferred and one per cent on the common on this capitalization?

A. I am not aware that we have any preferred stock. I am not aware that we have anything that corresponds with your question?

X Q. 646. Well, what has been your dividend? Have you ever paid one?

A. Oh, yes.

X Q. 647. How much?

103 A. Oh, I have seen dividends declared as high as, I think, $100,000 in a year, or $110,000, and sometimes as low as forty, and last year none at all.

Mr. Sullivan: I don't think of anything else to ask.
The Court: Anything in the redirect?
Mr. Dodge: A very few questions, your Honor.
Mr. Noble: Will your Honor indulge us for just a second?
The Court: Certainly.
[Counsel for the plaintiff hold a short conference.]

Redirect examination.

By Mr. Dodge:

Q. 648. There is one point upon which I do not wish any misunderstanding to be left, and that is with reference to the Buttterick Publishing Company and the Standard Fashion Company—the Butterick Publishing Company, which makes the pattern. There is some relation between the stockholders of the two companies, is there not?

A. There is a common ownership of the Butterick capital stock—of the Butterick Publishing Company capital stock.

Mr. Sullivan: What misunderstanding was there?
Mr. Dodge: I thought that perhaps the testimony left the impression with his Honor that there was no relation between the stockholders of the two companies.
Mr. Sullivan: Of course it did. I asked him if there was any control, through a holding company, or lease, or anything else.
Mr. Dodge: No, you did not ask him anything about a holding company.
Mr. Sullivan: Yes; those were the exact words that were used.
Mr. Dodge: I did not understand you to ask him anything about a holding company.
Mr. Noble: I didn't, either.
The Court: Let us have the question and answer read, and see what it was.
[The reporter reads as follows:]

"X Q. 640. Does your present concern represent any consolidations?

A. The Standard Fashion Company?

X Q. 641. Yes. Have you taken over any other concern?

A. No.

104 X Q. 642. The control of any other concern in the pattern business?

A. No.

X Q. 643. The Butterick, do you control that under any lease, working arrangement, or anything?

A. Nothing at all.

X Q. 644. You are two distinct concerns, in other words?

A. Absolutely, from the ground up."

Q. 649. You stated that there was a holding company. Are the executive officers of the two companies distinct?

A. Yes.

Q. 650. The business is performed entirely distinctly?

A. Entirely distinctly; yes, sir.

Q. 651. And they have no agreements among themselves?

A. Absolutely none that I know of.

Q. 652. That is, the only connection is the fact that there is a holding company that owns the stock?

A. That is all it is,—a majority of the capital stock of each of the two companies is owned by a holding company.

Q. 653. You were asked a question with reference to this point,—whether or not the R. H. White negotiations, or the R. H. White contract, was made with a view to the approaching termination of the contract with this defendant. What is the fact with reference to that?

A. When I made the contract with the R. H. White Company I had every reason to believe that the Magrane Houston agency would continue for another two years.

Q. 654. You say that you made the contract with the R. H. White Company the first of February?

A. The 7th of February.

Q. 655. How long before that time had you been negotiating with the R. H. White Company for the taking on of your agency after they got through with the other patterns?

A. Oh, upwards of a year and a half, or two years.

Q. 656. White had handled your goods before?

A. Yes; he had handled them prior to 1913.

Q. 657. You have already stated that there is in your contract with White a provision that you should be allowed to continue to supply the Magrane agency?

A. Yes, sir.

Q. 658. One question I forgot to ask you before: You spoke
105 of the increase in price of your patterns. I will ask you whether or not other patterns have been increased in price recently?

A. Patterns of other makes?

Q. 659. Yes.

A. Yes, all the patterns have been increased in price.

Q. 660. That figure of 5½ cents profit over the manufacturing cost of patterns which you referred to relates only to patterns that are sold to the public through the agent?

A. Yes, patterns in regard to which we accomplish a full and complete sale to the public.

Q. 661. When a discarded pattern is returned, the allowance which you made of 90 per cent means that all that you have received for that pattern is 10 per cent of 7½ cents?

A. Yes.

Q. 662. Or three-quarters of a cent?

A. Ten per cent of whatever the particular price of the pattern may be.

Q. 663. So that of course there is a loss on that?

A. Yes.

Q. 664. With reference to the classes of expenses which you did not deduct in determining your estimated profit upon goods that would have been sold by this defendant, is it a fact that the general expenses of your business in any respect would have been affected by the continuance of this contract?

A. No; I can't see that the expenses would be affected in any way.

Q. 665. Would your expenses of designing and creating the ideas of the patterns have been changed any?

A. No; the same designing force right along.

Q. 666. I understood you to say that you would consider that the proper number of agents to have in a city like Boston and the retail district thereof would be three?

A. I should say I would like to have three; yes.

Q. 667. And whether or not you would expect to sell more patterns through three agencies than through two or one?

A. I would expect to sell more through three than through two or one; yes, sir.

Q. 668. That is, you had that in mind in fixing that figure at three?

A. Yes.

Q. 669. You spoke of five or six large stores in the country, and named two or three of them, I think, where you say that two patterns are handled, and you have said that it would be an ad-
106 vantage to any retailer, any storekeeper, if he could get those terms, to handle two patterns?

A. Yes; I said that I think it would be a money advantage to them. It decidedly would.

Q. 670. Is it the fact that the pattern companies who sell their patterns in Marshall Field's store pay for the privilege of doing it?

A. I so understand that they pay for the privilege of doing it.

Q. 671. That is because of the very exceptional reputation of that house?

A. For the use that they are allowed to make of the Marshall Field store I should suppose that the pattern manufacturers would expect to pay.

Q. 672. I think that you said that there was one particular in which the McCall form of contract differed from yours. What is that?

A. They do not redeem their pattern stocks that the merchant does not sell, and it has the effect of making a greater accumulation of pattern stock with the merchant.

Q. 673. So the merchant stands the loss on them?

A. The entire loss is on the merchant; yes.

Q. 674. By the way, I think that perhaps you placed White's store a little nearer the Magrane Houston store than it really is. It is on the further corner of the second street up Washington Street, isn't it; that is, instead of being diagonally opposite, it is up at the further corner of Bedford Street?

A. Bedford Street; yes; and Temple Place is Magrane's. There would be a block intervening.

Q. 675. That is, it is diagonally across from the corner of West Street and not of Temple Place?

A. Yes, sir.

Mr. Dodge: I think that that is all.

Recross-examination.

By Mr. Sullivan:

X Q. 676. These patterns that were returned, what did you do with the patterns that were returned?

A. They are held by us down there subject to your order.

X Q. 677. Are they any good?

A. Some of them are; yes.

X Q. 678. Are they good to you?

A. Some of them are.

X Q. 679. Worth the $788?

A. To us? Oh, no. If you want the exact figures, a thou-
107 sand dollars' worth would weigh about 100 pounds and would be worth maybe four or five dollars, I suppose, as waste paper.

X Q. 680. Styles are not synonymous everywhere, are they? Styles don't burst on the world in all cities at the same time, do they?

A. In the United States I rather think that they do. You can't sell out of date styles anywhere in the United States.

X Q. 681. Even in the small places?

A. Yes. It has been tried by one company and they have found that it is a failure.

X Q. 682. Not your company?

A. No.

X Q. 683. You say that the McCall people vary in their practice from the Standard in that they don't take return stocks?

A. Yes; it is not their practice.

X Q. 684. They exchange stocks right along, don't they?

A. Yes.

X Q. 685. So that a merchant can take care of himself as he sees the end of the contract approaching, can't he?

A. I doubt it very much.

X Q. 686. All that we had was a thousand dollars' worth, wasn't it?

A. You had a thousand dollars' worth originally.

X Q. 687. That is all we sent back?

A. You returned to us an amount corresponding to the original stock received.

X Q. 688. So that that was all that accumulated there?

A. There was substantially no accumulation in your case.

X Q. 689. Just one thing that you adverted to this morning,—that it would injure you throughout the country to have it pointed out that you had been ousted from our store by the McCall people; you remember that?

A. Yes, sir.

X Q. 690. Has there been any other ousting by the McCall people of your patterns from any store?

A. Nothing of such prominence as the Magrane Houston Company.

X Q. 691. Has there been anywhere by any other pattern company?

A. There have been oustings here and there occasionally.

X Q. 692. So that this is not anything novel?

A. An ousting in violation of contract is quite novel; yes.

X Q. 693. Well, has the changing—that is the important
108 thing, isn't it—the changing over is what might work injury to you, isn't it?

A. Just what do you mean by changing over?

X Q. 694. From yours to the McCall?

A. No, not the change, but the significance that the changing over would be made to have in the minds of merchants throughout the country.

X Q. 695. Oh, you mean that the agents or representatives of pattern manufacturers might tell other merchants that the Magrane Company had decided to throw your contract up in the way that they did, and got away with it, and therefore they could do it?

A. They might do even that.

X Q. 696. Is that what you fear?

A. That is part of what I fear.

X Q. 697. That is, you think that it would injure your business if it were known that a firm took a contract like this for two years, and from term to term thereafter, and complied with it strictly for two years and three months—and they did that, didn't they?

A. For more than two years and three months.

X Q. 698. You think that it would hurt you to have that known, provided it was also known that if they didn't give notice of termination it would go on indefinitely?

A. No; no great damage would attach to a change in a pattern, but a change under these conditions has damaging possibilities for us.

X Q. 699. That is, when you urge that as an element of damage on the court, what you mean is that you would like to be able to say to possible or present customers that, if they sign a contract which renews itself from term to term, it goes on forever unless notice is given within thirty days after the expiration of some one of these two-year periods?

A. Not in just that way. I wouldn't say forever, because we very often close business relations with a concern,—take the initiative in doing it.

X Q. 700. So far as the right of the merchant to get rid of it——

A. He has the right once in two years to do it.

X Q. 701. And if he lets the thirty days go by he is stuck for a further term of two years?

A. They do business with us for two years.

X Q. 702. And three months?

A. And three months.

X Q. 703. So that the best time in which he could escape from it would be two years and one day and three months?

A. Two years and three months is the minimum term of the business association that that contract contemplates; yes.

Mr. Sullivan: That is all.

Redirect examination.

(By Mr. Dodge:)

Q. 704. I want it to be perfectly clear as to the value to you of those goods which were returned to you, and which you are holding. Were there some of those patterns that were still up-to-date and have a market value?

A. Yes; there would be some that we could restore to stock, I think. I haven't examined them to ascertain that fact, but undoubtedly there would be quite a few of them in condition to put back into stock.

Q. 705. You have not ascertained what the value of them is?

A. We haven't checked the shipment up at all. I know that it is there.

Q. 706. You were asked about the McCall contract and other breaches of contract. Do you know whether it was the McCall contract that was responsible for the Fisher case in the State courts with the Butterick Company?

A. Yes, that was the McCall contract.

Mr. Dodge: That is all.

WALTER H. MARSH (sworn).

(By Mr. Dodge:)

Q. 1. Your name is Walter H. Marsh?

A. Yes, sir.

Q. 2. And where do you live?

A. I live in Hudson, New Hampshire.

Q. 3. And are you in business in Boston?

A. I am.

Q. 4. Employed by the Standard Fashion Company?

A. As manager of the Boston branch office.

Q. 5. Manager of the Boston branch office. And how long have you occupied that position?

A. Since 1914—1904.

Q. 6. 1904?

A. 1904.

Q. 7. Was that the beginning of your employment by the Standard Fashion Company?

A. That was the beginning.

Q. 8. Are you familiar with the retail dry goods district, as it has been called, in Boston?

A. Yes.

Q. 9. Are you familiar with the various stores that handle patterns?

A. I am.

Q. 10. I hand you a plan and ask you if you had that prepared, showing the streets and the stores devoted to dry goods [placing before the witness a blueprint plan]?

A. Yes.

Q. 11. Between Boylston Street and Beacon Street, or Boylston Street and School Street, and Tremont Street and Washington Street, or Arch Street?

A. Yes, sir.

Q. 12. That shows substantially all of the——

The Court: Tremont and Washington Streets and Boylston and School Streets?

Mr. Dodge: Yes, sir; that is substantially it. I see it does go a little to the east, as far as Chauncy Street, or Arch Street,—a little east of Washington Street.

Q. 13. And does that show substantially all the dry goods stores?

A. Yes, sir.

Q. 14. All the stores which handle patterns?

A. Yes, sir; I think they are all located.

Q. 15. I want to ask you one preliminary question. You see the Magrane and Houston store at the corner of Temple Place and Washington Street. I want to ask you what other stores that handle patterns are nearer that store than is the R. H. White Company?

A. There is the Jordan Marsh Company store directly across the street; and Shepard & Norwell in the same block, on Temple Place, Temple Place and Winter Street; and the Butterick Publishing Company has a salesroom of its own just in the next block. The May Manton people have a salesroom, or an agency, in Temple Place, two or three doors, I think, from the Magrane Houston Company.

Q. 16. How about the T. D. Whitney store?

A. They have no patterns.

Q. 17. Now, isn't the Gilchrist store on Washington Street somewhat nearer than R. H. White's?

The Court: Nearer to what?

111 Mr. Dodge: Nearer the Magrane and Houston store.

A. Why, I should think it was a little nearer.

Q. 18. A trifle nearer?

A. Yes, sir.

Q. 19. Are there any others that are nearer the defendant's store than White's?

A. Those that I have mentioned

Q. 20. Any others than those you have already mentioned?

A. I think not. I don't locate any here.

Q. 21. Are you familiar with the other pattern concerns besides the Standard?

A. To some extent; yes.

Q. 22. Do you know where their agencies are located in Boston?

A. Yes. The Pictorial have an agency with the Jordan Marsh Company.

Q. 23. Where is the McCall Company located, other than with the defendant?

A. They have an agency with the Gilchrist Company, and with the W. & A. Bacon Company, and Butler's store, on Tremont Street the corner of Bosworth Street.

Mr. Sheehan: In addition to the Magrane & Houston?

Mr. Dodge: Yes. I asked that.

Q. 24. And do those three stores that you have just named handle any other patterns than the McCall?

A. Butler's store handles also the May Manton patterns.

Q. 25. The May Manton patterns are distributed on a somewhat different basis from all the others, aren't they?

A. I understand so.

Q. 26. Is it the fact that they are sold on consignment?

A. They are consigned, and sold on consignment, usually.

Q. 27. A totally different sort of arrangement?

A. A different sort of arrangement.

Q. 28. Where are the Butterick patterns sold?

A. The Butterick patterns are sold by the Shepard, Norwell & Company, and they also have, as I said, a salesroom of their own, at 499 Washington Street, that is between Temple Place and West Street.

Q. 29. Proceed and tell us about some of the other companies.

A. The May Manton patterns are sold in the Chandler corset store on Temple Place as well as at the Butler store. The Elite is sold at 453 Washington Street. And the Paris patterns are sold
112 at 7 (I think) Temple Place. Vogue is sold on Tremont Street, near the corner of West, an upstairs location.

Q. 30. You have spoken of the Pictorial at Jordan & Marsh's. How about the Home pattern made by the Ladies' Home Journal?

A. Those are sold by the C. F. Hovey Company.

Q. 31. Now, are all those agencies that you have named within 750 feet of the Magrane Houston store?

A. Yes, measuring 750 feet, this plan.

Q. 32. Is there any pattern concern, pattern manufacturer, that you know of, that does not have an agency within 750 feet of the Magrane Houston concern?

A. The Peerless Company.

Q. 33. That is the only one?

A. That is the only one that I recall. That is the only one.

Mr. Dodge: I would like to put this plan in evidence, Mr. Sullivan.

Mr. Sullivan: All right, if it was made accurately.

Q. 34. This was made, was it not, Mr. Marsh, with special reference to this case?

A. Yes, sir.

Q. 35. You had it drawn by an engineer?

A. Yes, sir.

Q. 36. And, so far as you know, it is an accurate plan?

A. I had a plan that was similar to this, that was drawn sometime ago, covering the retail dry goods district, and when this case came up I had that old plan redrawn, that is, there had been some changes in the business properties since my first plan was made, but this is brought up to date.

Q. 37. And you had the dry goods stores put on it?

A. Yes, sir.

Mr. Dodge: I think that that is all. Oh, before having it marked, I want to ask Mr. Marsh where that store of Grosberg's was at which the Standard patterns were being sold when the contract with the defendant was made.

The Witness: That was located in the block south from the Magrane & Houston Company, on the opposite side of the street, in the next block.

Q. 38. Between Avon and Bedford Streets?

A. Yes, sir.

Q. 39. So that it was nearer the Magrane Houston Company store than is the R. H. White Company store?

A. It was.

Q. 40. And have you marked a cross with a pencil on the
113 place where that store was, on the east side of Washington Street?

A. About the location; yes, sir.

[The map referred to, entitled "Map of the Dry Goods District, Boston, Mass. Drawing by Edwin K. Blaikie, 67 Milk St., Boston. Scale 100 Ft. = 1 In. Job 419, July 18, 1917," is marked "815 Eq., Plff's Ex. 14, J. E. G., Jr., Dep. Clk., 11/27/17."]

Q. 41. Have you made investigation, Mr. Marsh, of the agencies of all the pattern companies in a wider extent of territory, that is, in Boston and some of the immediately adjacent cities?

A. Yes, I have personally visited agencies for patterns, pattern agencies, in Boston, Somerville, Cambridge, Chelsea and Brookline.

Q. 42. How many pattern agencies are there in those cities?

A. I personally have visited 119.

Q. 43. One hundred and nineteen.

A. Yes, sir.

Q. 44. How many of those are agencies of the Standard?

A. Eight.

Q. 45. And are those all the agencies which the Standard has in those cities?

A. I believe so.

Q. 46. How many agents has the McCall in that same territory?

The Court: Pardon me. I do not like to interfere, but how is it material to wander off into other cities with regard to the number of agencies?

Mr. Dodge: Simply not to confine our attention to this very small

retail dry goods section of Boston, but to take greater Boston, on the question of monopoly and restraint of competition, etc.; we felt that it might be important to show a larger area.

Mr. Sullivan: I don't know. I am not quite clear as to what is the state of affairs, if the act is important, whether the question is whether the specific contract tends to create a monopoly. If it does, I think it is obnoxious to the statute. Because they cannot succeed in doing it does not make their contract virtuous, I think.

Mr. Dodge: Does this comment relate to this specific evidence that I am offering, or is it general?

Mr. Sullivan: No; I am trying to make it specific. Because you have not succeeded in doing what you would like to do is no proof that this contract——

114 Mr. Dodge: I do not get the bearing of that on this offer of proof.

Mr. Sullivan: I thought that you were attempting to show that you haven't a monopoly, that there were a lot of other companies.

Mr. Dodge: I want to show the business in this locality, taking "locality" first in the restricted sense, but now in the broader sense, but still within the limits of this municipality.

The Court: The defendant, in its answer, sets up the statute, does it not, Mr. Sullivan?

Mr. Sullivan: Yes; I intended to, at least. I don't know whether I am happy in my phraseology or not, but that is what I meant

The Court: Then what is done in other cities, how is that material?

Mr. Dodge: Because this act, like the Sherman Act, has got to be construed in the light of reason, and it is a question whether there is now, or has been in the making of this contract, any tendency towards the establishment of an undue monopoly, or an undue restraint of trade. I thought that conditions in a somewhat wider area might be competent. If your Honor does not think so, I do not care to press it, but it does seem to me that it is competent to show that the tendency of this contract, and of contracts of this sort, is not to create a monopoly in any one kind of pattern in the City of Boston.

The Court: In the City of Boston, yes, but you wandered outside.

Mr. Dodge: I took those immediately adjacent municipalities which are practically a part of Boston, right across the river. Cambridge is only seven minutes from this store, I take it.

Mr. Sullivan: Greater Boston is a term that includes even the part of the country that I come from, if you talk with the Greater Bostonites.

Mr. Dodge: The places that we have taken are places right across the harbor or river, such as Chelsea and Somerville, right within seven minutes from the Park Street station, like Cambridge,—

115 adjoining Boston, and really part of it,—like Brookline, for example.

The Court: I thought that perhaps it would shorten it a little bit, but I guess it hasn't.

Q. 47. I simply asked how many agencies the McCall Company had?

A. The McCall Company has in that district twelve.

Q. 48. And give us the others?

A. The Standard, eight; the Butterick, twenty-three; the New Idea, eighteen; the Home, four; the Peerless, two; the McCall, twelve; the May Manton, twenty-four; the Pictorial, twenty-four; the Paris Pattern Company, one; Vogue pattern, one; Elite, one; Bon Ton, one.

Q. 49. And those last, which have only one, are confined to the Boston district?

A. Yes, sir.

Cross-examination.

(By Mr. Sullivan:)

X Q. 50. You don't mean that those are stores, all of them?

A. No.

X Q. 51. Not in the sense that our store is a store. You have been in a little Buck-Eye stores, wherever you could find them?

A. Yes.

X Q. 52. Where you could find a May Manton stock in the window—a little store that some old widow runs,—a one-person store?

A. Very likely.

X Q. 53. There are lots of those stores, aren't there?

A. Very likely.

X Q. 54. What?

A. Very likely.

X Q. 55. Yes. Well, "very likely" there are. There are, aren't there?

A. I don't know whether they are run by widows or not.

X Q. 56. I didn't mean that you inquired about that; but how many stores are there on your list that are comparable to ours, in a general way, I mean,—that is what we want to get at?

A. Why, there are not many outside of the Boston district, of course.

X Q. 57. Well, how many are there in Boston, roughly?

A. How many agencies?

X Q. 58. No, no.

A. There are a number of course.

116 X Q. 59. You are right here in Boston; you are not in New York.

A. I am in Boston; yes.

X Q. 60. You live here?

A. Yes, sir.

X Q. 61. And you know what we are talking about, then, pretty well,—this district here around Magrane's, Jordan's, White's, and those stores?

A. Yes.

X Q. 62. Surely a dozen would comprise all the stores that are in the same class, wouldn't it?

A. I should think it might.

X Q. 63. And perhaps I am strong in saying a dozen, am I not?
A. Taking all the dry goods stores?
X Q. 64. No, no; but the big fellows.
A. In the class of the Magrane and Houston?
X Q. 65. Yes; a dozen would cover it, wouldn't it?
A. I haven't counted them up.
X Q. 66. I haven't, but I am guessing. Isn't that true, probably?
A. I should think there would be as many as a dozen.
X Q. 67. How many does the Butterick Company have out of that dozen?

Mr. Noble: Out of the dozen? I didn't quite catch what that referred to.
The Court: Stores of the size of the Magrane and Houston store.

X Q. 68. The Butterick has how many, do you think?
A. Do you consider Timothy Smith of Roxbury in your class?
X Q. 69. Well, I'll play it safe, and say no, if he is out in Roxbury. I don't know what my client would think of me if I should agree that a Roxbury store was equal to the Magrane and Houston.

Mr. Dodge: It was limited to the Boston district, wasn't it?
Mr. Sullivan: I think that the question was too vague. I will change it, anyway.

X Q. 70. Who had Jordan's last summer, at the time——
A. The Pictorial.
X Q. 71. Filene had nobody?
A. No.
X Q. 72. And Stearns had nobody?
A. No.
X Q. 73. Shepard?
A. They have Butterick.
X Q. 74. Shepard's is a big concern, bigger than ours, of course, isn't it?
A. Perhaps so.
117 X Q. 75. You think so, don't you?
A. I think so.
X Q. 76. Well, I only want what you think. You work for the Butterick people, don't you?
A. I do.
X Q. 77. Do you?
A. Yes.
X Q. 78. So the Butterick and Standard are the same thing, aren't they?
A. No, sir.
X Q. 79. What?
A. No.
X Q. 80. Well, you work for the Butterick?
A. I work for the Butterick.
X Q. 81. And did you put this contract through for the Standard?
A. Why——
X Q. 82. Did you? Yes or no?

Mr. Dodge: "Put it through" is rather a general——

Mr. Sullivan: Oh, you understand that colloquialism, don't you? You are the one that put it on to the Magrane and Houston people, got them to sign this contract,—you got them to sign the contract, didn't you?

The Witness: That credit belongs to somebody else.

Mr. Dodge: Solicited the contract? I do not like your phrase "put it on to them." They probably wrote this to everybody.

X Q. 83. You are the one that went to Mr. Hanley, you represented the Standard in the negotiations which resulted in this happy union, if you want to put it that way?

A. Yes.

X Q. 84. For the Standard?

A. Yes, sir.

X Q. 85. Were you working for the Butterick then?

A. Yes, sir.

X Q. 86. So that the employees are interchangeable, are they?

A. To some extent; yes, sir.

X Q. 87. You get your money from the one and work for the other; is that it?

A. I represent the Standard.

X Q. 88. As well as the Butterick?

A. Yes, sir.

X Q. 89. How many agencies has the Butterick got?

A. They have got Shepard's and their own salesroom right in that district.

X Q. 90. This salesroom of the Butterick's is near Magrane's, is it?

A. Yes.

X Q. 91. Across the street?

A. Across the block on the same side.

118 X Q. 92. Upstairs or on the ground floor?

A. On the ground floor.

X Q. 93. And do you do business for them?

A. I do.

X Q. 94. So that this concern that operates these two companies has got three large concerns here by Magrane's?

A. I don't think I understand.

X Q. 95. The Butterick and the Standard had how many?

A. There were three agencies for the two.

X Q. 96. And they still have got three?

A. Two agencies and their own salesroom. The Standard has one agency and the Butterick the other.

X Q. 97. They still have that number?

A. They still have that number.

X Q. 98. Well, now, do you think that there is any trouble about getting another salesroom for the Standard?

A. Another salesroom?

X Q. 99. Yes.

A. I don't think we have tried to get another salesroom.

X Q. 100. Do you think that you would have had any trouble

last summer in selling the Standard goods under some arrangement in one of the big stores?

A. I never tried. I didn't try it at all.

X Q. 101. You didn't try it at all?

A. No.

X Q. 102. Well, did Mr. Scanlon come over here in the summer and see you?

A. This last summer?

X Q. 103. This last summer.

A. I don't recollect whether Mr. Scanlon was over last summer or not.

X Q. 104. Or Mr. Kelly? What effort was made, if you recollect, to find a place that you knew of?

A. I didn't look it up at all.

X Q. 105. Weren't you the fellow that did it?

A. No.

X Q. 106. Why?

A. Because it was not put up to me; it was not given to me to do it.

X Q. 107. Weren't you the Boston representative?

A. I was.

X Q. 108. And wouldn't you be the one, naturally, to do the soliciting?

A. Not necessarily.

X Q. 109. We don't like "necessarilies." Wouldn't you?

A. No.

119 X Q. 110. Who would be?

A. Anyone that Mr. Scanlon might designate.

X Q. 111. Whom would he designate?

A. A traveller from his office.

X Q. 112. Did the traveller come?

A. Mr. Scanlon himself came.

X Q. 113. When?

A. Last spring. You asked me about the summer, I think.

X Q. 114. So that he was over in the spring?

A. Yes, sir.

X Q. 115. But since Magrane gave up has he been over—in July?

A. No; not that I recall.

X Q. 116. Does Chandler's concern have patterns?

A. No.

X Q. 117. Stearns, Mr. Scanlon says, doesn't. Does it?

A. No.

X Q. 118. Have you tried them lately? Apparently it is some years since he tried them.

A. Chandler's dry goods store on Tremont Street?

X Q. 119. Or Stearns. Have you tried Stearns?

A. No, sir.

X Q. 120. Not for years?

A. Not since—I haven't talked patterns to them since they handled Standard patterns before.

X Q. 121. Before?

A. Yes, sir.
X Q. 122. Neither the Standard nor the Butterick?
A. No, sir.
X Q. 123. Did you visit the Magrane store during the time that they were carrying out their contract?
A. Oh, yes.
X Q. 124. Everything was carried out all right, wasn't it?
A. Oh, yes; I think so.
X Q. 125. No trouble for the two years and five months?
A. Why, nothing——
X Q. 126. Only the usual "kicks" about patterns,—eh?

Mr. Dodge: I don't think that the "kick" was on that side. I wish that you would let him answer that question. You interrupted him in his last answer.

Mr. Sullivan: Pardon me. I didn't mean to. I was a little zealous, that is all.

The Witness: I think there was a little trouble. I mean, I think that the Magrane people objected to paying for goods charged
120 on their purchasing account while they had exchange credit, credit on exchange account.

X Q. 127. You got along all right?
A. Oh, yes.
X Q. 128. They seemed to be willing to make money on your patterns, didn't they, seemed to be willing to sell them?
A. Yes.
X Q. 129. Did you notice the sales diminishing?
A. I didn't keep track of the sales.
X Q. 130. Well, just what do you do? You have the agency representing New York, don't you, for the two companies?
A. The Standard——
X Q. 131. No. Do you have the agency? Are you the——
A. No; I am the manager of the Boston branch office.
X Q. 132. Yes. Now, wouldn't you know if your business with them was diminishing? Wouldn't that be a matter of concern to you?
A. Well, I didn't know it, although it might have been true.
X Q. 133. You don't know whether it was or not?
A. I do not; no, sir.
X Q. 134. Well, the pattern business has become a little harder, a little less profitable, hasn't it, since the war?
A. I don't know anything about the profits in the pattern business.
X Q. 135. You don't?
A. No, sir.
X Q. 136. You haven't any idea of whether it is more or less profitable?
A. No, sir; positively not.
X Q. 137. You don't talk that at all while you are selling them?
A. Talk our profits when we are selling?

X Q. 138. Yes; how cheaply you are selling them, for instance, or how little profit you get?

A. If I attempted to talk profits, I should talk about something that I knew nothing about personally, excepting from hearsay.

X Q. 139. Has the business, to your knowledge, become obviously complicated or difficult from the manufacturer's standpoint since the war, within the last year, for instance?

A. I am not competent to answer that.

X Q. 140. Is it common knowledge among people in your position and in your trade that the business is harder and less
121 profitable for the manufacturer in the last year and that it is growing more so?

A. I don't know. The cost of materials, of course, is more.

X Q. 141. Let me help you——

A. And the cost of labor is more. I can understand all that, but about the profits of the business, I don't know anything about those.

X Q. 142. I see. Well, do you remember bringing over money to Magrane's, because the business was getting down, to pay for advertising?

A. No, sir.

X Q. 143. Did you ever bring any $100 check over there?

A. I can't recall that I ever did.

X Q. 144. Well, did you arrange for the delivery of a check of $100 to see if they couldn't speed up the business a little by advertising?

A. Possibly I may have.

X Q. 145. Do you remember the incident?

A. I do not; no.

X Q. 146. Or of talking about it either,—do you remember an argument about it?

A. There was something about our doing something in the way of advertising here, newspaper advertising.

X Q. 147. When? When was that?

A. Why, I should think it was a year ago this last spring.

X Q. 148. Wasn't it this last spring?

A. No, sir; I don't think so.

X Q. 149. Well, was it because the business was sagging a little?

A. Not that I know of.

X Q. 150. What?

A. No, sir.

X Q. 151. Just a routine talk, was it?

A. I think so. I think that the Magrane people thought we should do something in the way of advertising the business in the newspapers, and we contributed something. The idea has gone from me as to what it was at the time.

Mr. Sullivan: That is all.

Mr. Dodge: Just a question or two, and then we shall be through, your Honor.

Redirect examination.

(By Mr. Dodge:)

Q. 152. Mr. Marsh, I want to get your answer on the record to this question: Did you deliver this letter of July 14, Plaintiff's Exhibit 13?

A. I did. I delivered it to Mr. Hanley.

122 Q. 153. On July 17?

A. On July 17.

The Court: July 17, 1917.

Q. 154. One other question, I think, and that is all, as long as it has been opened up. What effects, if any, of the war have you yourself observed in the pattern business?

A. In regard to the sales?

Q. 155. Yes; general conditions in Boston.

A. Why, I don't know that I have made any special observation.

Q. 156. Does everything seem to be about the same?

A. I should say everything was about the same.

Mr. Dodge: That is all, Mr. Marsh.

The Court: The prayer in the bill is for a preliminary injunction. I want to ask counsel if this is to be a final hearing in the matter. You are proceeding as if this was the final hearing upon the bill; the bill and the answer.

Mr. Dodge: This is a final hearing, your Honor. We concluded not to ask for a preliminary injunction, but to ask for this hearing on the merits.

The Court: We will adjourn now.

[Adjourned to 10 a. m., Wednesday, November 28, 1917.]

Boston, Mass., November 28, 1917.

Mr. Noble: Mr. Dodge will be here in just a moment, if your Honor please. He is in the clerk's office.

The Court: Do counsel think that we may conclude the hearing today?

Mr. Sullivan: I hope so; yes, sir.

Mr. Dodge: Mr. Marsh, will you take the stand for just a moment.

WALTER H. MARSH (recalled).

(By Mr. Dodge:)

Q. 157. You were asked, Mr. Marsh, with respect to your knowledge concerning financial conditions of this agency, certain questions of that sort. Does your office in Boston have anything to do with the handling of the accounts?

A. No, sir, it does not.

123 Q. 158. So that——

A. It is simply a supply agency, a supply branch office.

Q. 159. So that whether a particular agency is making money or not falls outside of your own knowledge?
A. That is outside my knowledge.

Mr. Dodge: That is all.

Cross-examination.

(By Mr. Sullivan:)

X Q. 160. Mr. Marsh, what would be your duties with reference to this defendant corporation had it continued for nineteen months more to use the plaintiff's product,—what would you have to do?
A. I would see that its orders were filled; that it got its monthly supplies.
X Q. 161. And what does that mean,—you would see that it got them? What would you do? Go there and see that it had them?
A. The monthly orders, standing orders, are made up at the New York office and shipped to the Boston branch office for delivery.
X Q. 162. I see. So that obviously if the contract is not carried out you are saved that labor, aren't you, among others?
A. Yes, sir.
X Q. 163. You work on a salary, I take it?
A. I do.
X Q. 164. And somebody, apparently, in New York, on the distributing end, would have work to do during that nineteen months, outside of the factory, wouldn't they?
A. I don't know that I quite understand you.
X Q. 165. If the contract was carried out the goods would be sent from the factory to some distributing centre or stores, would they, in New York? Do you know that?
A. They are distributed from the main office, as I understand it, in New York.
X Q. 166. Then they come from a factory to the main office, do they?
A. I think that they are manufactured at the main office.
X Q. 167. They are. And is there a distributing force or organization separate from the factory?
A. I couldn't say as to that.
X Q. 168. Haven't you ever been there?
A. Yes, but I don't know the details in that particular branch.
X Q. 169. But, at any rate, it was an incident of your work
124 with this defendant to keep visiting them and taking up with them whether they got what was coming to them?
A. The same as——
X Q. 170. The same as you do with others?
A. The same as I do with others.
X Q. 171. That is what you are paid to do?
A. It is a matter of routine.
X Q. 172. That is what you are paid to do?
A. Yes, sir.

Mr. Sullivan: That is all.

Mr. Dodge: That is all, Mr. Marsh.

Now, if your Honor please, I want to make a more formal offer of the House and Senate reports on this Clayton Act. I have a collection of decisions of the Supreme Court of the United States——

The Court: I thought that they were already in.

Mr. Dodge: They have not been marked as exhibits, and I do not know whether they should be marked as exhibits, or should merely be called to your Honor's judicial attention, as aids to the judicial notice which your Honor will take of them perhaps. There are just certain parts that I wanted to put in,—the section of the act as it was reported, and the comment of the committee on it as it appears on pages 6 to 9 of the Senate report.

The Court: Is there any objection?

Mr. Sullivan: No, sir.

Mr. Noble: And also the House report.

Mr. Dodge: Yes, the House report also. Shall I have these marked as exhibits? These are copies which I borrowed from the United States attorney, and I would like leave to substitute other copies, which I can obtain elsewhere. There being no objection to the admission of the documents, I suppose that I need not refer your Honor to the authorities that such reports are competent on the question of the interpretation of the statute. You do not make any question about that, I understand?

Mr. Sullivan: No.

[The substitute copies of reports, when furnished by Mr. Dodge, will be marked as follows: "Report No. 627, House of Representatives, 63d Congress, 2d Session, to accompany H. R. 15,677",
125 will be marked "Plaintiff's Exhibit 15". "Report No. 698, Senate, 63d Congress, 2d Session, to accompany H. R. 15,677", will be marked "Plaintiff's Exhibit 16".]

Mr. Sullivan: I want to ask Mr. Scanlon one or two questions before you rest, if there is nothing else.

Mr. Dodge: There are certain figures that I want to put in through Mr. Scanlon. He has not tabulated them yet. Subject to that reservation, I am ready to rest.

Mr. Scanlon, will you take the witness stand?

JOHN T. SCANLON (Resumed).

Cross-examination.

(By Mr. Sullivan:)

X Q. 707. Just one or two questions, Mr. Scanlon, on the line I pursued yesterday. Where is your factory? Is it right in the same place that your distributing agency is?

A. Where we make the patterns, do you mean?

X Q. 708. Yes.

A. No; the factory is over in H Street, I think it is, or some such street, in a separate building from our main office.

X Q. 709. Absolutely distinct organizations, then?

A. Absolutely; yes.

X Q. 710. And are you in the same building with the Butterick people?

A. The offices are; yes.

X Q. 711. The distributing end?

A. The distributing end is in New York, in the same building.

X Q. 712. And is it the Standard building or the Butterick building?

A. It is known as the Butterick building.

X Q. 713. And do you rent from the Butterick people?

A. We rent from them; yes, sir.

X Q. 714. You really are a company the stock of which is owned by the Butterick, or the controlling interest?

A. No; the stock shares, the controlling interest in the stock shares of the Standard Fashion Company is held by a holding company.

X Q. 715. They also hold the Butterick Company?

A. They control the shares of the Butterick Publishing Company.

126. X Q. 716. How many do you employ in the main offices in New York?

A. In the distributing end?

X Q. 717. Apart from your factory, what is your organization?

A. It would be about, probably, two or three hundred.

X Q. 718. And they are engaged in the business of accounting?

A. Some.

X Q. 719. The financial end?

A. Some of them.

X Q. 720. The distribution of product?

A. Yes.

X Q 721. How many do you employ in the factory?

A. In the factory we employ probably one hundred or one hundred and twenty.

X Q. 722. So that really both numerically and as a matter of expense the factory is the inferior end of your business, isn't it?

A. The factory is not the inferior end, if I understand you correctly.

X Q. 723. As a matter of expense in a pattern, in the cost of a pattern, the factory cost is the smallest?

A. In the pattern itself?

X Q. 724. Yes.

A. Why, yes, the factory expense is smaller than the other expenses, I should say.

X Q. 725. And yet, as I got your testimony yesterday, you figured that the profits in a pattern are the difference between the factory cost and the price that the merchant sends you?

A. In this case that is a perfectly accurate figure.

X Q. 726. In this case?

A. Yes.

X Q. 727. That is, you don't load on to this contract any per

cent at all of what it would cost you, for instance, for Mr. Marsh to visit them?

A. There would be no extra expense of that kind.

X Q. 728. No extra expense?

A. No; it wouldn't affect our overhead, as I explained yesterday.

X Q. 729. Well, if a few more did what the Magrane people did you wouldn't need any Mr. Marsh, would you?

A. Why, not a few more, but if a few thousand more did we wouldn't.

X Q. 730. In Boston?

A. Oh, yes, we would need Mr. Marsh. He controls the entire New England business. He looks after the office that caters to the New England business in Boston alone.

X Q. 731. Suppose now Mr. Scanlon (to get it down to
127 where I can make myself clear), you had in your entire business only Magrane and two others, and they all signed contracts like this, and then all broke them, we will say, before you started to distribute, so that you didn't need any organization at all; do you still think that you would be entitled to the difference between the factory cost——

A. You will have to allow me——

X Q. 732. No. Just tell me if that is an intelligible question; is it?

A. It is not intelligible; no.

X Q. 733. All right. In charging Magrane 7½ cents for those patterns you have figured into it other expenses besides factory costs, obviously, haven't you?

A. In fixing our sales price, do you mean?

X Q. 734. Yes.

A. Surely.

X Q. 735. And when the contract is not carried out many of those costs are eliminated, are they not?

A. Not in a case where an individual contract is not carried out.

X Q. 736. Well, let us see. You, for instance, I assume, get a substantial salary, don't you?

A. Moderate.

X. Q. 737. It is a moderate one for your services, doubtless, but still you get it, don't you?

A. Yes, indeed.

X Q. 738. And you might, conceivably, in the course of the next two years, have to devote, we will say, one hour to the Magrane contract mightn't you?

A. I might; yes, sir.

X Q. 739. And your time even for an hour is not worthless, is it.

A. I think not.

X Q. 740. And, therefore, if they break their contract and pay you damages, you are saved that hour for example, aren't you?

A. No; I will be paid for devoting it to something else, in that case, incidental to the general business.

X Q. 741. You will bring in a profit to the company by the employment of that hour in some other part of the business?

A. Not necessarily.

X Q. 742. I am using that only illustratively; isn't that true?

A. The application of that reasoning is not true.

X Q. 743. Well, is that true? Is it true that you would use that hour profitably, using that merely as a symbol?

128 A. That being a supposititious case with reference to the future I can't say; I don't know.

X Q. 744. You are doing a lot of supposing in reference to the future here, aren't you, in this matter?

A. Oh, no.

X Q. 745. What?

A. Oh, no.

X Q. 746. Well, you are asking the court to give you damages on what is going to happen in the future, aren't you?

A. No, not exactly that.

X Q. 747. Based on the past?

A. Yes, based on the past.

X Q. 748. Well, now, you have a past, haven't you?

A. I think so.

X Q. 749. I mean a business past. I thought that you being a man I could ask you that. But you have a past in the business sense, which affords you a foundation for estimating, even with your modesty, what your services for one year are worth to this company, havent you?

A. That can be determined very accurately.

X Q. 750. Yes. And you concede, or admit, as the story goes, that they are worth something to the company?

A. My hours?

X Q. 751. Yes, every one of them.

A. Yes, every one of them.

X Q. 752. Now, isn't it unescapable, Mr. Scanlon, that you are not giving this defendant credit for some of the expenses that would go into the completing or carrying on of your contract with him, when you merely credit him with the factory expense?

A. I think I have figured that with absolute fairness, the way I did. His going on or not going on with the contract would not materially affect our overhead. You understand that that account is one of thousands.

X Q. 753. Exactly. But can't it be reduced to a percentage basis? I don't want to pay for the beautiful building in New York.

A. No. In all candor, I don't know how to do it, and I can't understand how it can be done.

X Q. 754. Since yesterday have you thought over the matter of the ratio of your profits to your sales?

A. No, I haven't given it much thought—practically none.

X Q. 755. And you still feel that there is no way in these

129 days of efficiency—you have got nobody in your plant that could tell you what that is?

A. Why, yes, I have seen it attempted, but, as I say, I am distrustful of that thing.

X Q. 756. What is that you distrust.

A. These manifestations of what you call efficiency.

X Q. 757. What manifestations have made you distrustful?

A. Why, they come to us with claims of what they will do for us, but, as I say, we are distrustful of them.

X Q. 758. No; I mean people in your own organization?

A. We have never had it done.

X Q. 759. You buy your paper in large quantities?

A. Yes.

X Q. 760. And your printing is done in large quantities?

A. Yes, by contract.

X Q. 761. Yes, but these little patterns?

A. The printing?

X Q. 762. Yes.

A. There is very little printing in connection with a pattern.

X Q. 763. No. So that somebody has figured for you, taking as a start the cost of these large paper contracts—somebody has figured it down so fine that he can tell you to a cent what it cost you for a little piece of paper pattern, hasn't he?

A. I know that.

X Q. 764. Well, somebody has,—you know that?

A. Well, I have done it myself.

X Q. 765. And yet you say that there is no one, yourself or anybody else in your office, that has figured down what the larger cost of that pattern is, namely, the overhead of your distributing and office establishment?

A. No, we haven't figured it, and as I say, I don't believe myself that it can be done.

X Q. 766. It is a definite thing, isn't it? Every year you know from your books what that establishment has cost your company?

A. The factory?

X Q. 767. No; the other.

A. Oh, as a whole, yes; surely.

X Q. 768. Have you got the figures with you?

A. No, I have not.

X Q. 769. And you say that it is impossible, having the gross amount that it cost for salaries, from you down, and for overhead, rent, following up contracts, etc.—you say that it is impossible,
130 knowing that figure, and the number of patterns, for instance, that knowing that figure, and the number of patterns, for instance, that you sold, to find out what the relation of one to the other is?

A. Absolutely, because the apportionment of overhead in each business would overlap in such a way that it would be utterly unreliable.

X Q. 770. Well, it is a fact that there is a cost on each pattern for overhead isn't it?

A. Unquestionably.

X Q. 771. And merely because you find it, as a matter of accounting, difficult to apportion that to a pattern, does not mean that you should charge somebody with a profit, does it, omitting that?

A. Yes, absolutely, in a case like this.

X Q. 772. In a case like this?

A. Yes. If I may comment on——

X Q. 773. I would rather you wouldn't.

Mr. Dodge: Why not let him say what he wants to? I shall ask him to if you don't let him.

Mr. Sullivan: Well, you may. I feel pretty guilty for letting him elaborate in the way that he did yesterday.

X Q. 774. You have testified in a great many cases, haven't you, Mr. Scanlon?

A. No, not many.

X Q. 775. In all the States?

A. Testified in court proceedings?

X Q. 776. Yes.

A. No.

X Q. 777. Well, your company seems to have bobbed up in a great many different States in this sort of litigation, doesn't it?

A. We have been the victims in a great many States of cases like this.

X Q. 778. The victims?

A. Yes.

X Q. 779. Always the victims?

A. Generally, when it was over; yes.

X Q. 780. And you answered, when you testified to Mr. Dodge about the contract of the other companies—you were speaking from what you felt to be a more or less accurate knowledge?

A. Yes.

X Q. 781. And when his Honor indicated that you might tell what you found to be the general run of them, you spoke
131 from knowledge that you had acquired as an incident of your business?

A. Yes, what I had acquired in the way of reliable information.

X Q. 782. Did you know that the McCall Company had eliminated this negative covenant, so-called, since the passage of the Clayton Act?

A. No, I didn't know it.

X Q. 783. Did you know that there is not a negative covenant in its contract now?

A. I didn't know that.

X Q. 784. Did you know that it does not now contain that negative covenant?

A. No.

X Q. 785. If so, that would affect materially your opinion as to what the general run of contracts was, wouldn't it, if there were 12,000 of those outstanding?

A. If it were so.

X Q. 786. Does the R. H. White contract have that in it?

A. Absolutely.

X Q. 787. Did you say that the McCall people have 12,000 agencies?

A. They claim to have 12,000. I think they probably have pretty near that number.

X Q. 788. Could you give the court any information as to the

comparative size of their agencies compared with yours and the Butterick?

A. Well, having 12,000 stores, as I think they have, approximately, against our 6,000, it follows that they have, probably, a great many more small agencies than we have.

X Q. 789. How many of them has the Butterick?

A. The Butterick has in the neighborhood of 10,000; under 10,000.

X Q. 790. That is 16,000 for the two allied companies?

A. Yes.

X Q. 791. How many has the New Idea?

A. About 4,000, or 3,800.

X Q. 792. That is an allied company?

A. That is an allied company.

X Q. 793. So that the combination of those three allied companies has about 20,000 agencies?

A. Yes, out of 52,000 pattern agencies in the country.

X Q. 794. You control directly about 20,000?

A. About 20,000. You are speaking of the Standard Fashion Company?

X Q. 795. I am speaking of the company that controls the three of them.

A. I doubt if that is an accurate statement.

132 X Q. 796. Is 20,000 accurate?

A. 20,000 is right, but I mean about our controlling the 20,000.

X Q. 797. Does the holding company control the three?

A. The holding company holds the stock shares of the three companies.

X Q. 798. The same officers?

A. No.

X Q. 799. Are you an officer in the holding company?

A. No.

X Q. 800. Are you a stockholder in it?

A. I am a director in it.

X Q. 801. A director. Well, that is an officer. How many directors are there?

A. Eleven.

X Q. 802. Some from the Butterick Company?

A. Yes.

X Q. 803. Some from the New Idea?

A. Yes.

X Q. 804. They are all represented on the board?

A. Yes.

Redirect examination.

(By Mr. Dodge:)

Q. 805. How long has that holding company held the stock of the Butterick Company and the Standard Fashion Company?

A. How long has the holding company held it?

Q. 806. Yes.

A. Since 1900, I think; about 1900 or 1901, somewhere along there—1899,—the year before, 1899.

Q. 807. And the New Idea since——

A. Since 1902 or 1903.

Q. 808. You spoke of the difficulty of apportioning the overhead expense, or the part of the overhead expense which naturally belongs to the pattern. What is the difficulty or peculiarity, if there is one, about your business?

A. Why, the inter-relation of the overhead to the publication, as well as the patterns, in my judgment, it is quite impossible to say where the overhead of any one end of the business begins or stops.

Q. 809. Whether or not the designers who are working upon the designs of patterns are also preparing illustrations for the publications?

A. Yes, that is true.

Q. 810. Does your company also publish a magazine wholly apart from its pattern business?

A. Yes; we publish a monthly magazine, The Designer.

Q. 811. The Designer. How many times, as a matter of fact, have you testified in court for the Standard Fashion Company?

A. I think this might be the third time.

133 Q. 812. You started to offer an explanation of some answer which you made to Mr. Sullivan. Perhaps you don't remember what you were starting to say then, but if you do I would like to have you say it now.

A. I had difficulty in getting my mind in agreeance with what was in Mr. Sullivan's mind, the applicability of the overhead to the damages in this case. Briefly, what I mean is that the furnishing of those patterns, the making of them or not making of them, will not affect our overhead one cent, one way or the other,—the general overhead. If we were called upon to make them, we would have the factory cost added to what we would otherwise have; if we were not called upon to make them, we would not have that factory cost.

Q. 813. You spoke of its being difficult to apportion the overhead between the factory and the office, and you said that some of the employees in the manufacturing end are employed in the office?

A. Yes.

Q. 814. Are the designers of the patterns employed in the office?

A. Yes.

Q. 815. And not in the factory?

A. No.

Mr. Dodge: That is all.

Recross-examination.

(By Mr. Sullivan:)

X Q. 816. Have you figured in the discards?

A. The discards?

X Q. 817. When you say that the cost is two cents, have you figured in the discards in that?

A. Why, I think that would take care of the discards reasonably.

X Q. 818. Are you sure?

A. I can verify that, satisfy myself of that, in a very few minutes.

X Q. 819. But you are giving yourself a little the best of it, probably.

A. I think not, in all probability.

X Q. 820. You think not?

A. Yes.

X Q. 821. What would they amount to in a year?

A. The discards?

X Q. 822. Have you ever found out what the percentage is?

A. Of the discards?

134 X Q. 823. Yes.

A. In the case of the Magrane Houston Company, yes, I have the exact figures.

Mr. Sheehan: He put in the exact figures.

X Q. 824. You put in what they had been?

A. Yes.

X Q. 825. You haven't got in your mind what proportion or what percentage is charged off, have you, for discards on your whole business?

A. Charged off for discards?

X Q. 826. To what extent the cost of your patterns is affected by discards.

A. Oh, I should say a small fraction of a cent on a pattern.

X Q. 827. Well, I am still curious, Mr. Scanlon, to know how you know that 7½ cents will cover you when you sell a pattern?

A. Well, right at the present time 7½ cents might not cover it, you see.

X Q. 828. No; but how do you know it is that rather than ten or fifteen?

A. Well, I explained to you that the market is in a transition state now, where we really may have to figure on some further readjustment of the retail prices.

X Q. 829. How do you know? What readjustment if you don't figure into each pattern your overhead and distributing expenses?

A. Why, it's this way: The tissue paper we buy thousands of reams a year of, use thousands of reams, and we know what that costs now. We have some idea what it may cost us within the next year. If it is going to add substantially to the cost, we may have to increase the retail price of the patterns in order to get back the increased cost.

X Q. 830. Well, supposing salaries are doubled, what then? Does that affect the cost of your patterns?

A. I don't myself entertain that thought at all.

X Q. 831. Supposing that to be true, just as a pleasant dream,—supposing that all salaries go up with other wages? Wages are going up, aren't they?

A. In some departments, yes.

X Q. 832. Well, will you add that on to the patterns?

A. It depends on which department is affected.

X Q. 833. If it is the pattern department.

A. We would have to.

X Q. 834. In other words, you have got some way in which
135 you arrive at 7½ cents at the proper selling price of that pattern other than merely figuring the factory cost as two cents?

A. That is developed from an experience of thirty years, not from any present immediate calculation.

X Q. 835. I understood that you said that there is not very much profit in the other end of your contract with Magrane?

A. What do you mean?

X Q. 836. The publications.

A. In the fashion sheet there is quite a good profit.

X Q. 837. Is that true, that there is a profit in those?

A. Oh, yes.

X Q. 838. Isn't it recognized in the business that there is not?

A. That there is not a profit?

X Q. 839. Yes.

A. Oh, no. We sell those at 7.50, and they cost us 4.80.

X Q. 840. Is that factory cost?

A. Under contract.

X Q. 841. Is that the printer's charge?

A. That is the printer's charge.

X Q. 842. When you say they cost you 4.80, there is no addition in that for your salary or overhead?

A. Nothing goes into that of that sort.

X Q. 843. Is there anything that you figure overhead into?

A. Yes.

X Q. 844. What?

A. The whole business.

X Q. 845. And each part, the fashion sheet, the magazine, and the pattern, bears its proportionate share, doesn't it?

A. No. There is where my difficulty is. I have never been able to satisfactorily apportion the overhead to the different branches of business.

X Q. 846. And you haven't made any effort to in preparation for this trial?

A. No.

X Q. 847. Do you yourself print these patterns, print what is printed on them?

A. No, we don't print them.

X Q. 848. Or is there anything printed on them?

A. Yes, there is something printed on them.

X Q. 849. Do you print that [placing before the witness Plaintiff's Exhibit 5]?

A. No; we have that printing done for us.

136 X Q. 850. Do you cut them?

A. Oh, yes; we manufacture the patterns.

X Q. 851. You don't let out the cutting to somebody else; you manufacture the patterns?

A. Yes, sir.

X Q. 852. The shape?

A. Yes.

X Q. 853. And the head designer designs for the Butterick Company also?

A. Oh, no; that is an entirely different organization.

X Q. 854. Aren't there one or two designers at the top that design for all those three companies?

A. Oh, no, no. We are very careful to avoid that.

Mr. Sullivan: That is all.

Mr. Dodge: That is all, Mr. Scanlon. Subject to the reservation which I mentioned, we rest.

Evidence for Defendant.

ALFRED JOHN ROTHEROE (sworn).

(By Mr. Sullivan:)

Q. 1. Will you give us your full name?

A. Alfred John Rotheroe.

Q. 2. And where do you live, Mr. Rotheroe?

A. New York City.

Q. 3. And you are employed there in what capacity?

A. I am with the McCall Company as auditor and assistant treasurer.

Q. 4. How long have you been in the employ of the McCall Company?

A. Thirteen years.

Q. 5. In that same capacity?

A. For eleven years; yes.

Q. 6. And prior to that did you have any connection with the pattern business, so-called?

A. Before going to the McCall people?

Q. 7. Yes.

A. No.

Q. 8. The McCall Company that you refer to is the pattern company that we have been discussing here?

A. Yes.

Q. 9. And they are a large competitor of the Standard-Butterick-New Idea combination?

A. Yes.

Q. 10. And what is their general style of agency or contract? How do they do business?

A. By printed contract.

Q. 11. I know. But by placing their product under contract in dry good stores, retail dry goods stores?

A. Yes.

137 Q. 12. Wholly in dry goods stores?

A. No, not entirely.

Q. 13. In some other kinds of stores?

A. Yes; we have them in all kinds of stores,—stationery stores if we can't get dry goods stores.

Q. 14. And all over the United States, I take it?
A. Yes, and Canada.
Q. 15. Is most of their work done under written contract, or printed contract?
A. Yes; entirely.
Q. 16. What is your relation to the contract end of it in the course of your duties there?
A. I accept or reject the contracts that come in.
Q. 17. So that they come immediately under your inspection and supervision?
A. Yes, all contracts.
Q. 18. And are you familiar with the form of them?
A. Yes.
Q. 19. Do you know the form of the Magrane contract?
A. Yes, sir.
Q. 20. I show you that, and ask you whether that is the form that is in common use by the McCall people [passing a paper to the witness]?
A. Well, no, it couldn't be said to be in common use at this time. We are replacing our old contracts with those, signing up new ones, but we have a lot of outstanding contracts under the old form,—unexpired contracts.
Q. 21. Is this the one that is now being used?
A. Yes.
Q. 22. In 1917?
A. Yes.
Q. 23. And there is no negative covenant in this one that no other patterns shall be used in the store, is there, that you can see?
A. No. We eliminated those on account of——

Mr. Dodge: No. Just a minute.

Q. 24. When were those eliminated?

Mr. Dodge: Do you mean when was the new form, without that in it, first used?
Mr. Sullivan: Yes.
Mr. Dodge: I do not understand that it has been eliminated from the old contracts.
The Witness: We could not very well eliminate it from those.

Q. 25. But the new contracts that you have been making
138 this year, for instance?
A. It was either in the late fall of last year or early in this year. I personally had been agitating it for a long time, because our contracts——
Mr. Dodge: You are asked simply when it was.
The Witness: It was either the last of last year or the first of this year; we had discussed it so long a time that, honestly, I couldn't remember.
Q. 26. Did the old contracts have the negative covenant that the agents should not have any other patterns in their stores?
A. Yes, and other restrictive clauses, too.

Q. 27. Do you recall any other restrictive clauses which have been omitted from the so-called new contracts that were in the old?
A. Yes.
Q. 28. What?
A. We had a clause requiring the dealer not to sell for other than the labeled retail price marked on it.
Q. 29. That has been changed, has it?
A. Yes; and we insisted on their keeping the patterns on the first floor. We took that out.
Q. 30. You took that out?
A. Yes.
Q. 31. How many contracts have you of all kinds?

Mr. Dodge: Will you read me what he said about what they insisted on?

[The reporter reads as follows:]

"A. We had a clause requiring the dealer not to sell for other than the labeled retail price marked on it.
Q. 29. That has been changed, has it?
A. Yes; and we insisted on their keeping the patterns on the first floor. We took that out.
Q. 30. You took that out?
A. Yes."

You took that out, and the negative covenant, and was there any other thing that was taken out?
The Witness: The price.
Q. 32. Why were those things taken out?

Mr. Dodge: I object.
The Court: Why do you offer it?
Mr. Sullivan: To show that they were taken out with reference to the passage of this act.
The Court: That is their opinion?
139 Mr. Sullivan: Yes, sir.
The Court: Some others might interpret it otherwise. Do you confine it to this company?
Mr. Sullivan: No.
The Court: Then why inquire into it?
Mr. Sullivan: Mr. Scanlon has testified to the general use of covenants contained in contracts like the one in suit. We offer to show that that is not so, and has not been so since immediately after the passage of the Clayton Act, and we want to show how that act operated upon this company as a basis for the argument that his statement that it is in general use ought to be entirely discredited.
The Court: That is, your purpose in offering this testimony is not to meet the statement or evidence of Mr. Scanlon, but you offer it, you say, for the purpose of showing the interpretation placed upon the Clayton Act by the McCall Company,—that is your purpose in offering it, isn't it,—not the other?
Mr. Sullivan: That is exactly the purpose,—for the very purpose

of affecting Mr. Scanlon's credibility in the whole affair, and the accuracy of his statements.

The Court: It might be admissible upon that ground, but not upon the other.

Mr. Dodge: The reasons why have no bearing on that.

The Court: Mr. Scanlon did testify as to a general custom of the pattern manufacturing companies to include in their contracts this negative agreement that no other patterns should be sold in the store,—that that was the general custom. Now, as bearing upon his testimony, that statement in it, you may show that the McCall Company pursued another course.

Mr. Sullivan: Well, there being nobody's mind here to be affected but your Honor's mind, I should not feel that it was very important to me to show what the McCall people thought of it, as affecting your mind.

The Court: Along the other line, as to the interpretation placed upon the Clayton Act by the McCall Company, and by this witness, that seems to be objectionable.

140 Mr. Sullivan: I think it is, on reflection. What I really had in mind, if your Honor will pardon me a further word, was that, before the passage of the Clayton Act was so well known a thing, it was a matter of discussion, as the witness said, and it might be competent to show that there was discussion in this company, as a basis for the argument that there probably was in all companies, and that Mr. Scanlon knew it, and that discussion resulted in definite action being taken by others. That I am not able to prove except by inference. However, I would rather waive it than have an exception on it, I think.

Q. 33. At any rate, how many do you think of these new forms are in existence out of the twelve thousand,—how many have you supplanted? Have you any way of telling, roughly?

A. I should imagine between 350 and 400.

Q. 34. Now, are you doing it as fast as they expire?

A. Yes, on the new contracts that we obtain.

Q. 35. That is, you have permanently, or at least for the present, discarded the old form of contract containing the covenants that we have talked about?

A. Yes.

Q. 36. Do you know of any other company of those that are leading companies that has made such a change?

A. No, I don't, but I am not very familiar with their contracts.

Q. 37. With the other contracts?

A. Yes.

Q. 38. Now, in the course of your duties as auditor, what relation do your position and the duties attendant upon it have to the figuring of cost?

A. I control the figuring of cost.

Q. 39. What do you mean by controlling it? Do you do it?

A. No; I direct how it shall be done.

Q. 40. And do you know the Butterick-Standard-New Idea combination?

A. Yes.

Q. 41. And do you know their patterns, as an incident of knowing your own work,—know them when you see them?

A. No, I don't think I do. I don't know much about that.

Q. 42. You don't know much about the practical side of the patterns?

A. No.

Q. 43. But you know in a general way, do you, that the product is marketed about the same as yours is?

A. Yes, I believe so.

141 Q. 44. And that the patterns, in a general way, so far as their make-up goes, are like yours?

A. Very similar.

Q. 45. And that they operate under written contracts?

A. Yes.

Q. 46. Now, do you have a factory?

A. Yes.

Q. 47. Is it distinct from your distributing end?

A. No; it is all in the same building.

Q. 48. All in the same building?

A. Yes.

Q. 49. You have a large distributing end, I suppose, a selling, and an accounting, financial, department, and all the usual apparatus that goes with a big business?

A. Yes.

Q. 50. Are the results of the cost figurer's work handed in to you?

A. Yes.

Q. 51. And you determine the cost?

A. Yes.

Q. 52. Is it determined what the cost of each pattern is?

A. Yes.

Q. 53. So that you can tell in your business what the cost of each pattern is?

A. Yes, except for an element of uncertainty in regard to one of the items of cost, that is, the discard item.

Q. 54. The discard item?

A. It is impossible to actually get that.

Q. 55. Until it happens?

A. It is never in such a condition that you can get it. I should be glad to explain that if——

Q. 56. I am going to give you a chance in a moment. Passing for just a moment the element of uncertainty, and taking up what is certain, what is certain in the cost of a pattern?

A. The cost of the material and labor.

Q. 57. And what is the labor?

A. The labor in the cutting department and the designing, and every class of labor.

Q. 58. I want to get the way in which your patterns are figured. Can you tell what the ratio of annual profit is to annual sales?

A. Yes.

Mr. Dodge: What is that?

[The reporter reads as follows:]

"Q. 58. I want to get the way in which your patterns are figured. Can you tell what the ratio of annual profit is to annual sales?
A. Yes."

142 Q. 59. And in getting that do you figure in the expense of your distributing and financial and accounting end?
A. Everything goes in.
Q. 60. Rent and everything else?
A. Everything.
Q. 61. That is figured in a definite system, is it?
A. Yes.
Q. 62. Of accounting?
A. Yes.
Q. 63. So you can tell from your books at any time what per cent of profit there should be in any given amount of sales, other than this discard item?
A. What there should be?
Q. 64. Yes.
A. Yes.
Q. 65. Now, what is the trouble about discards? What does it mean, and how does it make unstable the figuring of cost?
A. There is a liability on every pattern that goes out, until that pattern is sold over the counter by the dealer—there is a liability that the manufacturer may be called upon to replace that pattern one or several times. Ultimately it is bound to come back as a discard.
Q. 66. Is there any other element of uncertainty that you know of, when you know that there has been a sale of a pattern, in figuring up what the profit is?
A. No, I don't know of any.
Q. 67. So that would—you say that it is possible, from your experience, to take any given sale and tell in your company what the profit is?
A. Yes.
Q. 68. Do you know about the situation in the trade within the last year or two as to whether there has been any fundamental change, so-called, in it?
A. Fundamental in what regard?
Q. 69. With reference to the cost of raw materials, or anything of that kind?
A. Their earning capacities?
Q. 70. No. Has there been a downward or an upward change, or is it stable?
A. Upward in cost.
Q. 71. And how long has that movement persisted now?
A. It started soon after the—probably after the end of the first year of the war. Tissue paper is the thing most affected, and that is going up yet.
Q. 72. There has been no diminution in the movement,—the upward movement?
A. Not to my knowledge; no.

143 Q. 73. That, of course, has affected the cost?
A. Yes.
Q. 74. And prices to the consumer?
A. Yes.
Q. 75. And has that condition affected sales, have you observed, throughout the trade generally?
A. That the pattern companies have increased their price, do you mean?
Q. 76. Yes. Has the increase in prices increased or diminished the number of sales of patterns?
A. It would be very hard to say whether any increase or diminution in the sales at this time would be due to any increase in the prices of the patterns, on account of the abnormal conditions by reason of the war.
Q. 77. Is it known in the trade to experienced men like yourself and Mr. Scanlon that there is a diminution in sales generally in the number of patterns sold?
A. No, I shouldn't think that there is a decrease in sales.
Q. 78. It is about the same?
A. Yes. I have recently investigated it very thoroughly, because surface indications seemed to be that there was a decrease, but on going into it deeper I was satisfied that there was not a decrease.
Q. 79. In your company?
A. In our company. You see you can't tell what your sales are unless you know what every man's stock is that is outstanding. It is either there or sold; you can't tell.
Q. 80. And it may come back to you, for all you know?
A. Yes.
Q. 81. Do you know the Standard organization at all? Have you ever been there?
A. No, I have never been there.
Q. 82. Well, do you know what is the usual profit in the trade on patterns under present conditions?

Mr. Dodge: Just a moment.
The Court: I do not suppose that their profits would be competent.
Mr. Sullivan: I suppose that their profits would not be controlling, because there might be things which would make them more or less efficient.
The Court: If there is objection made, I do not see how I can admit what the profits of the McCall Company were as compared with the Standard.
144 Mr. Sullivan: The question was a little broader than that. The question was what, from his experience, would he say would be a fair possible profit on a pattern in the trade, under present conditions.
The Court: He has testified that he knows nothing about the Standard organization, plant and factory. Is that true?
The Witness: Yes, sir.
The Court: How can he furnish any information, then, as to what their profits are?

Mr. Noble: I think that he said also that he had no experience in the pattern business except with the McCall people.

The Witness: That is right.

Mr. Sullivan: Just a minute. He said that he was familiar with the general nature of the Standard business, what they sold and how they sold. However, your Honor has ruled——

The Court: Under objection, I do not think that I will admit it.

Mr. Sullivan: May I make an offer of proof, to save my rights?

The Court: Yes.

Mr. Sullivan: I understand that he would say that the utmost margin would be ten per cent, if your Honor will save my rights on that.

The Court: Yes.

Q. 83. Are you a stockholder in the Standard?

A. No. I have a little Butterick stock.

Q. 84. Butterick stock?

A. I am sorry to say.

Q. 85. Why sorry?

A. They haven't paid any dividends for some time. I bought it at 28½, and yesterday it was quoted at 10½.

Q. 86. I guess the market didn't know about Mr. Scanlon's system of profits? Have you got any stock in the Standard?

A. I think they have——

Q. 87. Are you in the holding company?

A. I think that that is all the stock they have. I guess that is the only one that is listed, the Butterick.

Mr. Dodge: The stock that is on the market is the Butterick Company stock, isn't it, the holding company?

The Witness: Yes.

145 Q. 88. The subsidiaries are not quoted,—it is the holding company?

A. The holding company.

Q. 89. Do they pay dividends?

A. The Butterick? No; they have not this year.

Q. 90. Does your company pay dividends?

A. We haven't paid a dividend since October, 1916.

Q. 91. Did you before that?

A. Yes, on our first preferred.

Q. 2. And since then, not even on the first preferred?

A. No.

Q. 93. That is due to the abnormal conditions, is it?

Mr. Noble: How can he express an opinion on that, if the Court please?

Mr. Dodge: I object.

Mr. Sheehan: I object

Mr. Sullivan: The uniformity of objection here is rather appalling,—objections coming from all three gentlemen. I thought that perhaps you might, by sitting there all day and figuring, be able to tell us why you didn't pay a dividend even on the first preferred stock.

Mr. Dodge: I object.

Mr. Sullivan: If it was due to general conditions in the trade, wouldn't it be material?

Mr. Dodge: The only thing that is material is whether the company is making monopolistic profits

Mr. Sullivan: They are all affected, apparently, by the same conditions. That is all.

Cross-examination.

(By Mr. Dodge:)

X Q. 94. I was interested in your statement, Mr. Rotheroe, that you could figure a percentage of your profits upon the sales of patterns. That is what you said?

A. Yes.

X Q. 95. You sell a good many other articles, I see, besides patterns; that is, you sell fashion sheets, do you not?

A. Yes.

X Q. 96. You sell the McCall Complete Catalogue?

A. Yes.

X Q. 97. The Ready Reference Catalogue?

A. Yes.

X Q. 98. The McCall Book of Fashion?

A. Yes.

X Q. 99. McCall's Embroidery and Needlework Book?

A. Yes.

X Q. 100. McCall's Monthly Magazine?

A. Yes

146 X Q. 101. Pigeon-hole cases?

A. Yes.

X Q. 102. Drawer cabinets?

A. Yes.

X Q. 103. And counter-book covers?

A. Yes.

X Q. 104. And in order to apportion your profits to sales of patterns, of course you have got to apportion a great variety of overhead expenses among these different articles?

A. Yes.

X Q. 105. And do you also figure the profit that you make on the pigeon-hole cases, for instance?

A. Well, we don't figure the profit on the pigeonhole cases alone. That is included with the cabinets, what we call sundry merchandise, anything in the way of fixtures, or rubber stamps, that we buy for people to sell, other dealers, that is not of our own manufacture.

X Q. 106. You lump several articles together?

A. Yes.

X Q. 107. Do you apportion a part of the president's salary to those articles?

A. Yes.

X Q. 108. By some orderly method of division?

A. Yes.

X Q. 109. Of course it is impossible to determine just what fraction of the president's time, for example, is devoted to these different things?

A. Yes; it has to be more or less arbitrary.

X Q. 110. And it is the same way with all other items of overhead expense, isn't it, such as rents?

A. It is not entirely arbitrary, because we take the floor space that is used for these particular purposes and gauge it by that.

X Q. 111. There are various items as to which there has to be a more or less arbitrary division, of course?

A. Yes.

X Q. 112. If you are going to make an apportionment of that sort?

A. Yes.

X Q. 113. Now, there seems to be, under this form of contract, some limit upon the right of the retail dealer, special agent as you call him, do you not?

A. Yes.

X Q. 114. A limit upon his right to return discarded patterns. There is a limit upon his right, isn't there?

A. Do you mean the length of time within which he has to return them?

X Q. 115. Both the length of time and the quantity that he may return?

A. No, I don't think so. The quantity is apt to vary all the time. It wouldn't be embraced in the contract.

147 X Q. 116. Well, your right of exchange is somewhat different from that of the Standard Company? I am trying to get at that. You have a right to refuse to allow the agent to return patterns to you unless you have declared them to be discarded?

A. Yes, that is true.

X Q. 117. That is true. A semi-annual return?

A. Yes, but we discard the same number of patterns that we put in; the same number that we issue of new business.

X Q. 118. You discard the same number?

A. Yes.

X Q. 119. The contract speaks for itself. I would like to offer this. This does not seem to have been endorsed as approved and accepted by the McCall Company, in the lower left-hand corner, but it is signed by the McCall Company?

A. I imagine that the Magrane Houston Company have another copy of this contract which is properly executed. This was probably left by the traveler when he was here.

Mr. Sullivan: I thought that was our copy. It is a replica in every way.

Mr. Dodge: Well, let us have it marked.

[The contract between the McCall Company and the Magrane Houston Company, dated "2/2, 1917," is marked "875 Eq., Pl'ff's Ex. 17, J. E. G., Jr., Dep. Clk., 11/28/17."]

X Q. 120. Is this the only form of pattern contract that you are now using with new agents?

A. As to terms, yes; that is, general terms.

X Q. 121. Well, you make variations with different agents?

A. Yes, but not as to any special clauses, that is, these restrictive clauses, if that is what you are asking about.

X Q. 122. Those are all out now?

A. The quantities and terms.

X Q. 123. Those vary of course?

A. Yes.

X Q. 124. But is it the only printed blank that you are using now?

A. Oh, no; we have six or eight different forms of contract for different size deals and different conditions; but we have cut out all those restrictive clauses from all of them.

X Q. 125. Those three clauses that you have spoken of?

A. Yes.

148 X Q. 126. You haven't any other of your printed forms here with you, have you?

A. No, I haven't.

X Q. 127. Now, you say that of your 12,000—is that the number?

A. Well, I don't say under oath how many we have, because I couldn't in the first place, and I don't think it is very material, is it?

X Q. 128. Of your many thousands of agents, all but about 350 are operating under contracts which contain these restricted clauses?

A. I think there were about 258 renewals which I made on our new terms, and I am speculating on about 150 contracts——

X Q. 129. Three hundred and fifty to four hundred, and you used those only in cases where you had a new contract?

A. Yes, either for renewal or a new contract.

X Q. 130. That is, in the case of your old contracts, which have run along, although the term of the contract has expired, you haven't called those in to issue a new form?

A. No. As fast as we could we have gone around, in some cases two years before the expiration, to get them to use the new contracts.

X Q. 131. The new form was used only where there was a new contract, or where the old contract had expired?

A. No; we did it in the case that I have just described.

X Q. 132. How many of the 11,000 agents, assuming that there were 11,000, who were operating under the old form of contract are now operating under conditions which enable them to terminate the contract, or you to terminate it, on three months' notice?

A. We don't accept a contract that has a condition to terminate in three months,—a term and three months.

X Q. 133. Yes, a term and three months.

A. But you didn't say "a term."

X Q. 134. My question was meant to be this: How many of

your 11,000 agents who were operating under the old form of contract are now operating, after the expiration of the original term and during a period when apparently if the clause is the same as here three months' notice will terminate their relations with you——

A. Well, if we have any, we have overlooked them, that
149 is all, because pattern contracts are renewed two or three years in advance of the expiration.

X Q. 135. You are one of the concerns that sell patterns to the Marshall Field store?

A. Yes.

X Q. 136. And there is some other pattern besides yours being sold there?

A. Yes; the Home, I think.

X Q. 137. Or is it the fact—there was some testimony about that yesterday—is it the fact that your company pays the Marshall Field Company something for the privilege of having an agency with them?

A. No, that is not the fact.

X Q. 138. It is not the fact?

A. No.

X Q. 139. You do get some return from that agency?

A. Yes, we do.

X Q. 140. It is not all outgo?

A. No, not at this time.

X Q. 141. Of your 350 agents who are operating under this new form of contract, how many are handling a second pattern besides yours, today?

A. I couldn't even make an intelligent guess at that, but it is becoming more or less general, I think, with stores of any kind. Some are handling three.

X Q. 142. The May Manton?

A. No; I say that some are handling three.

X Q. 143. Can you name any agency outside of the Marshall Field store, and possibly one or two very large stores of that character,—can you name any agency that is today handling any pattern besides yours?

A. Yes. I don't think that that is a fair question without giving me time for preparation on it, but I can give you Macey and Abraham Strauss of Brooklyn. They both handle two, and they were considering putting in four, but whether they did or not I can't say.

X Q. 144. Outside of those two, can you name any other large store in Chicago or New York that is doing it?

A. No; I am not familiar with them.

Redirect Examination.

(By Mr. Sullivan:)

Q. 145. You say that it is becoming increasingly common to carry more than one pattern?

A. Yes, we think it is, and we thought that that clause had no
150 effect, no value for us, in our contract, and it has distinctly hurt us by the States not allowing us to sue under our contract——

Mr. Dodge: I ask that that be stricken out. I could not quite understand it, whether it was an opinion on the law, or what it was, but it was not responsive to the question, anyway.

The Court: Is there any objection to striking it out?

Mr. Sullivan: It was not responsive.

The Court: Strike it out.

Q. 146. How did it come to your attention that it was becoming increasingly common?

A. By our travelers reporting that it was, I judge.

Q. 147. In the figuring of the cost, what do you figure discards at?

A. Our figure comes to about 2¼ cents per pattern.

Q. 148. Above the factory cost?

A. Yes.

Mr. Sullivan: That is all.

The Witness: I shall be glad to state how that is arrived at if anybody wishes to know.

Mr. Sullivan: All the witnesses seem to be willing to help out. We may as well not limit you at this stage. How do you arrive at it?

The Witness: Our discards for an entire year at this time amounts to between three hundred fifty and four hundred thousand dollars, which divided by the number of patterns that we sell for the entire year gives the quotient of 2¼ cents, and that is as near a way of arriving at it as any that I can see.

Mr. Dodge: You take them back at 100 per cent?

The Witness: Some contracts and some at 90. Our stock limitation contracts are 100 and the others 90. We have about 2,000 stock limitation contracts, and they are all at 100.

Mr. Sullivan: That is all.

Recross-examination.

(By Mr. Dodge:)

X Q. 149. Well, if I understand you, the patterns that come back are, of course, valueless, except as waste paper?

A. Yes.

X Q. 150. You agree with Mr. Scanlon on that?

A. Yes; they are thrown down the chute.

151 X Q. 151. So that the pattern that comes back and is figured by you at two and a fraction cents is a pattern that is of no further use to you as a practical matter?

A. And we give them credit for it, or give them another pattern in place of it.

X Q. 152. But the pattern that comes back you charge off at the figure that represents its cost to you.

A. Yes.

X Q. 153. You don't take into consideration at all the patterns that are not returned to you within thirty days as the contract provides—not exchanged within thirty days?

A. Is that in regard to discards?

X Q. 154. Yes.

A. Is it?

X Q. 155. "Credit bill to be issued to us within thirty days after receipt by you of discarded patterns."

A. After receipt by us?

X Q. 156. Yes.

A. That doesn't limit their time of the return; that limits the time for them to get a credit note. We are taking them back now that should have been back immediately after the first of July.

Mr. Dodge: That is all.

Mr. Sullivan: That is all.

CHARLES A. HANLEY (sworn).

By Mr. Sullivan:

Q. 1. Will you give us your full name?

A. Charles A. Hanley.

Q. 2. You are the general manager of the defendant company's store, are you?

A. Merchandise manager.

Q. 3. And were you at the time of the entering into this McCall contract?

A. Yes.

Q. 4. And did you know about the plaintiff, the Standard people, having a department there in your store?

A. Yes.

Q. 5. Did you look up about the sales?

A. Yes.

Q. 6. During the two years. Can you tell the court whether they were increasing or diminishing?

Mr. Dodge: Now, just a moment. Have you got your books here?

Mr. Sullivan: No; but he has looked it up and knows.

152 Mr. Dodge: I do not propose to permit such evidence to go in without objection unless he has got the books here.

The Court: If the witness knows whether the sales increased or decreased——

Mr. Dodge: Only from an examination of the books——

The Court: He says he knows. I do not know what his source of knowledge is.

Mr. Sullivan: It is something that you can easily check up. You have your books of sales?

Mr. Dodge: We have.

Mr. Sullivan: You can confront him.

Mr. Dodge: I do not suppose that the witness has anything to do with the actual selling of the patterns.

The Court: He is in charge of the department, I understand.

Q. 7. You keep in touch with the sales in Boston?

A. Yes; I see the sales every night.

Q. 8. Were they increasing or diminishing at the expiration of the two years?

A. They were diminishing.

Q. 9. And are you able to say——

The Court: Well, that is in the case of the patterns, of course.

Q. 10. That is patterns?

A. Yes.

Q. 11. And what about the publications?

A. The general business, the total business of the pattern department, was all figured in one.

Q. 12. I see. So that you were not able to tell which end of it was suffering?

A. No.

Q. 13. But you did know that there was a diminution in the business?

A. Yes.

Q. 14. Was that before you heard of the R. H. White agency that you noticed that?

A. That was about the same time.

Q. 15. Then you learned of the R. H. White agency?

A. Yes.

Q. 16. Did you talk with Mr. Marsh at all.

A. Yes.

Q. 17. And then decided, when you found that out, to give up the contract?

Mr. Dodge: Wait a minute. I object.

Q. 18. Well, did you know about R. H. White's dickering with them when you gave up the contract?

A. Yes.

153 Q. 19. During the time that you say that you had it, for two years or more, and while this diminishing was in progress, White had no agency, as I understand it?

Mr. Dodge: You are elaborating a great deal on what he said. He has said that at the end it was diminishing and that is as far as he has gone.

Q. 20. How long had it been diminishing?

A. The second year showed quite a difference from the first and the last five months showed much greater loss than the second year even.

Q. 21. Now, since you have given up the contract are there calls for Standard patterns?

A. Yes.

Q. 22. And have you issued any instructions with reference to Standard customers?

A. Yes.

Q. 23. What?

A. That they should direct—that our clerk should tell the customers where they could get it, because we—he accepted money for the subscriptions, and we had to see that the orders were filled, in courtesy to our customers.

Q. 24. You took money from your customers for subscriptions to some of these publications?

A. Yes.

Q. 25. And when they would come in to inquire, you would send them over to White's?

A. Yes, if they inquired for anything that they wanted.

Q. 26. If they inquired for what?

A. If they inquired for the patterns or publication, either.

Q. 27. That is about all that you know about it, Mr. Hanley?

A. That is all.

Mr. Sullivan: That is all.

Mr. Dodge: No questions.

PATRICK B. MAGRANE (sworn).

By Mr. Sullivan:

Q. 1. Patrick B. Magrane, is it, Mr. Magrane?

A. Yes, sir.

Q. 2. And you are the treasurer of this defendant corporation, are you?

A. Yes, sir.

Q. 3. And are you there at the Boston store a good deal?

A. From four to five hours a day.

154 Q. 4. And, in a general way, did you know about the condition of the pattern department when the Standard people had charge of it, when you were using their patterns, about the sales, etc.?

A. Well, I would see the sales nightly almost; I would get reports at night.

Q. 5. Do you know whether what Mr. Hanley says in regard to the sales is correct, that the sales were diminishing.—was that your impression?

A. Yes.

Q. 6. And then you learned of the White contract, did you, at some time?

A. Yes, I have heard it spoken of; yes.

Q. 7. That something was going on for the installation of the Standard at White's?

A. Yes.

Q. 8. And apparently it is not important, but you read the contract to be that you could give a three months' notice.

A. Yes.

Mr. Dodge: I object.

Mr. Sullivan: I don't think that it is important, but that is the fact.

Mr. Dodge: I don't think that it is competent, whether it is important or not.

Mr. Sullivan: It is not strange that he read it that way, or that anyone else would.

Q. 9. At any rate, under your orders, notice was given discontinuing it, or attempting to?

A. Yes.

Q. 10. And the goods were shipped back that Mr. Scanlon has testified to?

A. Yes.

Q. 11. And I understand from talking with you, without going into any detail, the amount that he has stated is substantially correct, is it,—the credit would be $788.73?

A. That is what I have learned.

Q. 12. So far as you can investigate at the store, that is substantially correct, is it?

A. That is substantially correct; yes.

Q. 13. We had it eight hundred and a few dollars, but it is not worth talking about. That is all that you know about the incident?

A. That is all.

155 Q. 14. That is only one phase of your activities there, I suppose, this pattern business,—you left it to some subordinate a good deal?

A. Yes.

Q. 15. That is, in investigating about this credit, you found from your books that if this credit were given it would about square the account?

A. That about squares the account.

Q. 16. I am not speaking now of any possible damages, but of the actual account, the $500 credit, and the goods sold that were returned,—one about offset the other?

Mr. Dodge: What good does it do to say that they about offset. Of course one is a little over eight hundred dollars, and the other is a little under. I do not understand that he is contradicting the exact figures which have been put in.

Mr. Sullivan: That is all, I think.

Cross-examination.

By Mr. Dodge:

X Q. 17. Just one question. Mr. Wilson was the man who negotiated the original contract with the plaintiff in your behalf, wasn't he,—Mr. Charles H. Wilson?

A. I am not sure.

X Q. 18. He was at that time, in 1914, the manager of your Boston store?

A. No, sir.

X Q. 19. What was he?
A. He was the head bookkeeper.

Mr. Dodge: That is all.
Mr. Sullivan: That is all.

The Court: Anything further, Mr. Sullivan?
Mr. Sullivan: Will your Honor pardon me for a minute? [Mr. Sullivan has a short conference with his witnesses.] That is all, your Honor.
The Court: Anything in rebuttal, Mr. Dodge?
Mr. Noble: Will your Honor indulge us a moment?
The Court: We will suspend for five minutes.

[Recess for five minutes.]

Mr. Sullivan: We have a few suggestions as to rulings of law.
Mr. Dodge: With regard to this matter, if your Honor please, I had thought that as there is a good deal of law involved in this
156 case, possibly a written memorandum of law might be filed at some time.
The Court: I shall be glad to receive any such memoranda.
Mr. Dodge: And I would like to suggest that requests for rulings be furnished at that time.
Mr. Sullivan: These were drawn up rather hurriedly, and I would like to furnish mine at the same time that Mr. Dodge furnishes his.
Mr. Dodge: And we have agreed that the stenographer may write out the testimony, so that your Honor may have the report of the testimony.
The Court: Then you do not propose to make oral arguments, but to submit briefs?
Mr. Dodge: I would rather do that.
The Court: Then there will be a reply brief?
Mr. Dodge: Probably not.
The Court: Inasmuch as this is a novel question, it might be helpful to the court to have it covered pretty thoroughly.
Mr. Noble: We will try to cover it in the first instance, but if any question should arise on which we think that we can be of any assistance to the court, we shall be glad to furnish anything additional.
The Court: When will the briefs be filed?
Mr. Dodge: That will depend somewhat on when we get the stenographic record—Two weeks from today?
The Court: Then we will have that understanding?
Mr. Noble: Shall we send them to the clerk here, or to your Honor's residence?
The Court: Send them to the clerk.

[Adjourned.]

157 *Exhibits.*

PLAINTIFF'S EXHIBIT 6.

P. H. Magrane, President. [Electro here.] P. B. Magrane, Treasurer.

New York, Paris, London, Berlin, Belfast, Brussels, Nottingham, Chemnitz.

4409 Oct 16 '14

Magrane Houston Company.

Washington Street and Temple Place.

Cable Address Houshend. Telephone Oxford 2700.

Boston, Mass., Oct. 14, 1914.

The Standard Pattern Co., New York.

GENTLEMEN:

We are led to believe that our agency with the Ladies Home Journal pattern expires within a short time and as we desire to make new connections, will you kindly let us know if you are interested in making a proposition to us and oblige.

Your very truly,

MAGRANE HOUSTON CO.
CHAS. H. WILSON.

CW/J.

Answered Oct. 22 1914 J. T. S.

Scanlon Carroll Route Dept.

October 22nd, 1914.

Magrane Houston Company, Washington Street & Temple Place, Boston, Mass.

GENTLEMEN:

Replying to your Mr. Wilson's letter of October 14th, I write to say, let me hear from you when the termination of your present pattern arrangement is fixed, and, I shall then be pleased to take up the matter with you.

Respectfully,

MA. —— ——.

Plaintiff's Exhibit 7.

Mutual Agreement between the Standard Fashion Company, of New York, first party, and Magrane-Houston Co., of Boston, State of Mass., second party.

158 First party hereby grants to second party an Agency for the sale of Standard Patterns for their store in the City of Boston, State of Mass., for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided, and agrees to sell and deliver f. o. b. New York or at its branch office in Boston, Mass., to second party, Standard Patterns, at a discount of fifty per cent from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party at regular agents' rates; to allow second party to return discarded patterns semi-annually between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost for other patterns to be shipped at the time of return or thereafter; but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct and must be delivered in good order to first party at its general office in New York.

Second party agrees, in consideration of the above, to purchase from first party, for free distribution, Standard Fashion Sheets to a number not less than seventy-five thousand (75,000) per annum, and Handy Catalogues to a number not less than two thousand (2,000) per annum, to pay transportation charges on all goods ordered or returned under this agreement; to purchase and keep on hand at all times, except during the periods of exchange specified above, one thousand ($1,000) dollars' value in Standard Patterns, at net invoice prices, and to pay first party for a pattern stock of the amount stated above, to be selected by the first party, the terms of payment to be as follows: — dollars at time of signing this contract, and five hundred (500) dollars in thirty days after shipment of stock, the balance of the purchase price, five hundred ($500) dollars, to remain unpaid, as a Standing Credit, during the continuance of this agreement, and to become due and payable at its termination, second party to pay interest on this Standing Credit at the rate of 3 per cent per annum on January 15th of each year; all other purchases to be paid for on or before the 15th day of the month succeeding the date of shipment.

159 Second party also agrees not to assign or transfer this agency, nor to remove it from its original location without the written consent of said first party, not to sell or permit to be sold on the premises of second party, during the term of this contract, any other make of patterns, and not to sell Standard Patterns except at label prices. Second party further agrees to permit first party or its representative to take account of pattern stock whenever it desires, to pay proper attention to the sale of Standard Patterns, to conserve the best interests of the agency at all times, to re-order promptly

all patterns as sold, and to give the department a prominent position on the ground floor in the store.

Either party, desirous of terminating this agreement, must give the other party three months' notice in writing, within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months. Upon expiration of such notice, second party agrees to promptly return to first party all Standard Patterns bought under this contract and then on hand, which first party agrees to credit on receipt in good order at three-fourths cost, paying to second party, within thirty days after receipt of same, in cash, any balance due. Neglect to return the pattern stock within two weeks after expiration of three months' notice shall relieve first party from all obligation to redeem the same. Failure to require compliance with the strict letter of this agreement shall not constitute a waiver of any condition nor forfeit nor prejudice any right hereunder.

It is hereby acknowledged by both parties that there are no verbal understandings between them conflicting with this contract.

Dated November 25th, 1914.

STANDARD FASHION COMPANY,
Per ROBERT KELLY,
(*First Party*).
MAGRANE HOUSTON COMPANY,
P. B. MAGRANE, *Treas.*,
(*Second Party*).

Done at Boston, State of Mass.

Contract acknowledged. Ent'd Ag't's List.
Entered L. E. D. 2 New.

160 It is understood between the parties hereto that in the event of the business property of the Magrane Houston Company at Washington Street and Temple Place, or, a substantial part of said property being disposed of by the Magrane Houston Company for business other than dry goods or general department store, the said Magrane Houston Company shall have the privilege of terminating this contract regularly by giving the Standard Fashion Company due notice of such change in the premises aforesaid. Two weeks after the change in the premises shall have been made, the Magrane Houston Company may deliver its stock of Standard Patterns to the Standard Fashion Company for repurchase under the repurchase clause of this contract.

Advertising Matter—Rates and Privileges.

Fashion Sheets: $7.50 per thousand. In lots of 500 and over per month, printed with agent's advertisement (without extra charge) if changed only twice a year. Each additional change $2.00. In lots of 1,000 and over per month, printed with agent's advertisement, which may be changed quarterly (without extra charge). In

lots of 2,000 and over per month, printed with agent's advertisement, which may be changed monthly (without extra charge). Copy of advertisement for March issue must be in our hands by January 15th, to insure insertion. Make same allowance of time on all changes of advertisements. We reserve the right to repeat last advertisement if change is not received by us in due time.

Fashion Sheets: in lots of less than 500 of one issue, without extra printing: 65 cents per hundred; blank space on front page in which merchant may stamp his business card. When 250 or more of one issue are ordered, merchant's card will be printed on front page at a charge of 50c. for each printing.

Handy Catalogues (Issued February and August): $2.00 per hundred, with agent's card printed on first page of cover on orders of 100 or over of one issue, and a part of last page of cover in addition, with same advertisement as running on sheets, when 500 or more are ordered of one issue.

161 PLAINTIFF'S EXHIBIT 8.

Detailed Order.

5001, Jan. 27, '15.

November 25th, 1914.

Standard Fashion Co., New York:

Please ship to us, the goods specified herein, when ready, and charge to our account:

Stock and Tills:

$1,000 Patterns, net value, including Feby, 1915, issue, arranged cabinets
in [tills or packed]* (state which).
Glass Front Drawer Cabinets 1 pr. Ends on Memo.
6 Sections of [Pigeon Holes — holes each, @ $8.00 per 100, if "set up"; $6.00 per 100 if "knock-down."]*

New Monthly Patterns: Beginning with issue for March, 1915:

Class No. 10.

Advertising Matter:

Fashion Sheets.

Beginning with Feb'y Issue.

January	4,000	May	9,000	September ..	6,000
February	4,000	June	8,000	October	10,000
March	4,000	July	4,000	November ...	8,000
April	10,000	August	4,000	December ...	4,000

[*Words and figures enclosed in brackets erased in copy.]

Handy Catalogues.

Beginning with Spring Issue.

Spring Issue 1,000
Autumn Issue 1,000

Spec. order issued 1/28/15.
Entered for Class 10 M F 1/28-15.

Standard Fashion Book: Jan., Feb., March, April, May, June, July, Aug., Sept., Oct., Nov., Dec., 500 each issue.
"The Designer": 25 each month.
Standard Embroideries: 50 each issue.
1/27 15 A. D.

Note:—Unsold copies of "The Designer," Standard Fashion Book and Standard Embroideries are returnable at cost, and orders subject to change.

Large Catalogues, Counter use. 10 each month.
January, February, March, April, May, June,
July, August, September, October, November, December.

Entered Jan. 2 by A. Deutsch.

162 Addressed Postal Card Order Blanks with address, at $1.00 per 100.
[Five Line Rubber Stamp and Pad],* for printing card on blank Sheets and Catalogues, $1.00. (Copy herewith.)
Free Supplies: An assortment of Designer posters monthly. Newspaper Advertising Electros, Numbers, Sales Books, Addressed Envelopes, Order Blanks, Till Numbers, semi-annual Discard Lists and Inventory Blanks.

Signs: Steel Double Sign .$.50 1 Glass Sign $2.00
Brass
3 [Steel Faced]* 39 1 Plate Glass, 38 x 14.... 6.00
inch ..... .75 Plate Glass, 60 x 18.... 15.00

These Signs placed on consignment, at Agent's liability for valuations mentioned.
Usual supply.
Shipping Directions: Stock from New York c/o Boston Office.
Monthly shipment c/o Boston Office.
Small packages by Express. Ship packages over — lbs. by Freight.

(Sign here) MAGRANE HOUSTON COMPANY.
CHAS. H. WILSON.

Street No., Temple Pl. & Washington St.; Town, Boston; State, Mass.

[*Words and figures enclosed in brackets erased in copy.]

PLAINTIFF'S EXHIBIT 9.

[Electro here.]

4437, Mar. 23, '17.

New York, Paris, London, Berlin, Belfast, Brussels, Nottingham, Chemnitz.

Magrane Houston Company,

Washington Street and Temple Place.

Cable Address Houshend. Telephone Oxford 2700.

Boston, Mass., March 21, 1917.

The Standard Fashion Co., 12 Vandam St., New York, N. Y.

GENTLEMEN: Inasmuch as we have been advised you have decided to do business with the R. H. White Co., such information being confirmed by your Mr. Marsh today, we would respectfully ask that you discontinue with us at the earliest possible date.
163 Under our contract with you it is stated we are to give you three months' notice, we prefer, however, to discontinue by the time of the next issue.

A prompt reply will greatly oblige.

Yours very truly,

MAGRANE HOUSTON COMPANY,
By C. A. HANLEY.

CAH/MHM.

P. S. As requested by Mr. Marsh, we are sending a copy of this letter to him.

[Scanlon Francis Allen Pub. Dept. Fink]* Route Dept.
Previously received & acknowledged. J. B.

PLAINTIFF'S EXHIBIT 10.

Chicago, San Francisco, Toronto.

Standard Fashion Company.

Twelve to Sixteen Vandam Street, New York City,
March 23rd, 1917.

Messrs. Magrane Houston Company, Washington Street & Temple Place, Boston, Mass.

GENTLEMEN: We duly received yours of the 21st, requesting an immediate release from contract obligations, because of arrangements we have made selling our goods to the R. H. White Company.

[*Words and figures enclosed in brackets erased in copy.]

We respectfully decline to accede to your request, and in our opinion, there is nothing in the situation which justifies your making it.

As your letter seems to disclose a belief that our agreement with you can be terminated by three months' notice at any time, it is perhaps desirable that we should advise you that such is not the case, and that you — under engagement to handle our goods for the next two years.

Yours very truly,

STANDARD FASHION COMPANY.
J. BREWIS.

JB. RM.

164 PLAINTIFF'S EXHIBIT 11.

[Electro here.]

4324 Apr. 9, '17.

New York, Paris, London, Berlin, Belfast, Brussels, Nottingham, Chemnitz.

Magrane Houston Company.

Washington Street and Temple Place.

Cable Address Houshend. Telephone Beach 2700.

Boston, Mass., April 7, 1917.

The Standard Fashion Co., Van Dam St., New York, N. Y.

GENTLEMEN: The Magrane Houston Co. of Boston, Mass., hereby notify you that they have decided to terminate the sale of your Standard Fashion Patterns in their store in three (3) months from the above date, which is in conformity with the contract entered into between your company and the Magrane Houston Company, dated November 25, 1914.

Very truly yours,

P. B. MAGRANE,
President.

PBM/MHM.

Answered Apr. 11 1917. J. T. S.
[Scanlon Francis Allen Pub. Dept. Fink]* Route Dept.

[*Words and figures enclosed in brackets erased in copy.]

PLAINTIFF'S EXHIBIT 12.

Chicago, San Francisco, Toronto.

Standard Fashion Company,

Twelve to Sixteen Vandam Street, New York City,

April 11th, 1917.

The Magrane Houston Company, Boston, Massachusetts.

GENTLEMEN: We have your Mr. P. B. Magrane's letter of April 7th.

Replying thereto, we beg to refer you to your copy of the contract (if your copy is misplaced we shall be glad to send you another copy) under the conditions of which notice for the termination of the contract between us is not in order at this time.

Very truly yours,

STANDARD FASHION COMPANY.

MA.

165 PLAINTIFF'S EXHIBIT 13.

July 14th, 1617.

Messrs. Magrane Houston Company, Washington Street & Temple Place, Boston, Massachusetts.

GENTLEMEN:

We are in receipt of advice from our Boston representative that you have placed on sale in your store on Washington Street and Temple Place, another make of patterns than Standard Patterns, namely, McCall Patterns manufactured by the McCall Company.

This is in violation of your contract with us, which provides, among other things, that you shall not sell or permit to be sold on said premises any make of patterns other than Standard Patterns.

We hereby demand that you immediately withdraw from sale in said premises any make of paper patterns other than Standard Patterns and that you restore Standard Patterns to sale in said premises, and that you proceed to continue to perform all the conditions of your contract with us for the balance of its term.

Very truly yours,

STANDARD FASHION COMPANY,
J. T. SCANLON,
President.

M. A.

Del'd by Mr. Marsh to Mr. Hanley July 17, 1917—12.15 p. m.

PLAINTIFF'S EXHIBIT 17.

Pattern Agency Agreement.

Town Boston, State Mass., 2/2, 1917.

The McCall Company, New York, N. Y.

As your special agent at Boston Mass. deliver to carrier for us:

(*a*) A stock of McCall Patterns, including when instructions are given within six months from date issue, amounting to $800.00 at 50% of labelled retail prices. Of this amount $250.00 is to be paid by us thirty days after date of shipment; the balance, $550.00 is to remain as a standing credit during the operation of this agreement, upon which standing credit we agree to pay interest at the rate of 4% per annum.

166 (*b*) An average of $60.00 per month of new monthly patterns of your selection at 50% of labelled retail prices, commencing with the month following first stock shipment issue.

(*c*) Publications and supplies as specified on the reverse side hereof.

Discarded Patterns.

Patterns bought from you hereunder and reported by you semi-annually, in January and July, as discarded, may, during the operation of this agreement, be returned by us to your New York office during that January or February and that July or August only, at 100% of regular wholesale prices, in exchange for any patterns which may be shipped to us hereunder after the date of such discard report: In consideration of which we will reorder, weekly or oftener, patterns as sold. Credit bill to be issued to us within thirty days after receipt by you of discarded patterns.

Stock Limit.

A detailed inventory of patterns bought from you and on hand after each discarding, will be sent to you at the time of the return of the discarded patterns. If this inventory exceeds $800.00 at 50% of labelled retail prices, we may return to you patterns in excess of that amount, which patterns shall be credited to our open account at 100% of regular wholesale prices. Should the inventory show our stock of patterns (at 50% of labelled retail prices) to be less than $800.00 you may at once ship and bill to us enough patterns to restore the stock to that amount.

We will not assign this agency, nor move the same to other premises without your written consent.

All goods bought, except the original stock of patterns, will be paid for on or before the fifth of the month succeeding date of shipment.

All prices quoted are net, and we will pay transportation charges on all goods received from you or returned by us.

This agreement is to remain in force from date of approval and three acceptance at New York, N. Y., and for [five]* years after date of first shipment, and thereafter until the expiration of a three months' written notice given by either party to the other, and the
167 standing credit may be liquidated by the delivery to your New York office, within thirty days after the expiration and fulfillment of this agreement, of a sufficient quantity of patterns, in a reasonably good salable condition, bought hereunder, which shall be credited at 100% of the regular wholesale prices.

Agent's Signature: MAGRANE HOUSTON CO.,
By P. B. MAGRANE,
Treasurer.
THE McCALL COMPANY,
By FRANK J. PIERSON.

Approved and accepted, New York, N. Y., 19—.
THE McCALL COMPANY,
(Incorporated State of New York,)
By F. S.

Specifications for Publications and Supplies.

Fashion Sheets, beginning with the — issue, as follows:

January, 7,000; February, 7,000; March, 10,000; April, 10,000; May, 9,000; June, 7,000; July, 7,000; August, 7,000; September, 9,000; October, 10,000; November, 9,000; December, 7,000.

Price, $7.50 per thousand, including our name and address on the front cover and an advertisement of approximately one-half of the back cover (which may be changed 6 times each year) without additional charge.

The following publications are not returnable, but the quantities are subject to revision by reasonable notice.

Ready Reference Catalogue (March and September) 1,000 copies, each issue, at $1.00 per hundred net.

In lots of 500 or more copies of the Ready Reference Catalogue, our display advertisement is to be printed on the outside front cover page without charge. The copy may be changed with each issue.

Copy, for display advertisements for any publications which may carry our advertisements, is to be furnished you on or before the fifth of the second month preceding the dated month of publication for which such copy is intended. The McCall Company may re-
168 fuse to print any advertisements which are for any reason considered unsuitable for publication.

The McCall Complete Catalogue (Monthly), 10 copies, each issue, at 10c. per copy. (For counter use.)

McCall Book of Fashions (Quarterly):

[*Words and figures enclosed in brackets erased in copy.]

Spring 500 copies, Summer 500 copies, Autumn 500 copies, Winter 500 copies, at 60% of retail price (each copy to contain a coupon good for any 15c. McCall Pattern free, redeemable by The McCall Company).

McCall's Embroidery and Needlework Book, 10 copies per month, at 60% of retail price (each copy to contain a coupon good for any 10c. McCall Kaumagraph Pattern free, redeemable by The McCall Company).

McCall's Magazine (Monthly), 30 copies, each issue, at 60% of retail price.

Pigeonhole Cases (finished oak or mahogany), — sections, containing — tills per section, at 6c. per till. — bases, no charge.

Drawer Cabinets (finished oak or mahogany) — sections of — (15 or 18) drawers per section at $1.00 per drawer, — ends, at $3.50 per pair.

Counter Book Covers at 75c. each.

Signs (loaned) as follows:

Sales Books, Magazine Subscription Books, Colored Plates and Show Cards to be furnished without charge.

169 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Magrane Houston Company, a corporation organized under the laws of the State of Massachusetts and a citizen and resident of said State, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-seventh day of March next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein The Standard Fashion Company, a corporation duly organized under the laws of the State of New York and a citizen and resident of said State, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles F. Johnson, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this thirteenth day of March in the year of Our Lord one thousand nine hundred and eighteen.

CHARLES F. JOHNSON,
United States Circuit Judge.

Acknowledgment of Service on Citation on Appeal.

Due service of the within citation on the Magrane Houston Company is hereby acknowledged.

JAMES W. SULLIVAN,
Attorney for Magrane Houston Company.

170 *Clerk's Certificate.*

UNITED STATES OF AMERICA:
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity, entitled No. 815. The Standard Fashion Company, Plaintiff, v. Magrane Houston Company, Defendant, in said District Court determined, the Opinion of the Court, dated March 9, 1918. Plaintiff's Petition for Appeal. Plaintiff's Assignment of Errors. Stipulation as to Use of Exhibits, Stipulation as to Record. Præcipe, and also the original Citation issued upon the appeal of the plaintiff, with Acknowledgment of Service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said District Court, at Boston, in said district, this twenty-first day of March, A. D. 1918.

[SEAL.] JAMES S. ALLEN,
Clerk.

171 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1343.

THE STANDARD FASHION COMPANY, Plaintiff, Appellant,

v.

MAGRANE HOUSTON COMPANY, Defendant, Appellee.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Dodge, Bingham and Brown, JJ.

Opinion of the Court.

June 28, 1918.

PER CURIAM:

The plaintiff fails to satisfy us that the negative covenant in its contract with the defendant is one which the court should enforce by injunction, even if it is not in violation of the Clayton Act. We do not think it sufficiently proved that the plaintiff will sustain any substantial injury from the breach of that covenant beyond that for which it can recover damages in a suit at law.

While the covenant forbids the defendant "to sell or permit to be sold" on its premises, patterns other than the plaintiff's, it does not prevent defendant from selling elsewhere, and the plaintiff is

left free to establish other agencies for their sale, wherever it may be able to do so; and it had in fact, while the contract was in force, established another agency with a concern larger than the defendant, doing business in the defendant's immediate vicinity. That
172 the loss of the defendant's agency during the unexpired term of the contract damages the plaintiff, under these circumstances, to an amount not calculable in money, we are not prepared to believe upon the testimony of the plaintiff's president, which is all that is offered to support the claim.

The circumstances under which like negative covenants were enforced by injunction in Butterick, etc., Co. v. Fisher, 203 Mass. 122, or in those cases in other State courts upon which the plaintiff relies, were, in this and other material respects, different from those presented in this case. The decisions referred to are not in any event binding upon us. The negative covenant here in question being in its nature auxiliary to the performance of agreements which we cannot order specifically performed, is therefore not to be enforced by injunction unless such relief is shown clearly necessary to prevent substantial injustice, in the absence of any adequate remedy at law.

In Javierre v. Central Altagracia, 217 U. S. 502, the issue of an injunction to enforce a negative covenant of this character was disapproved. It was said (p. 508) that "There is a certain anomaly in granting the half way relief of an injunction" against the breach of such a covenant "when the court is not prepared to enforce the performance to accomplish which indirectly is the only object of the negative decree."

In Dalzell v. Dueber Mfg. Co., 149 U. S. 315, the court said, applying the language of Colson v. Thompson, 2 Wheat., 336, 341,—

"The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy."

We do not think it can be said that the contract here in question is so clear in its terms that neither party could reasonably misunderstand them. The negative covenant is as follows:

173 "Second party also agrees * * * not to sell or permit to be sold on the premises of second party, during the term of this contract, any other make of patterns and not to sell Standard Patterns except at label prices."

It is necessary to determine the meaning of the phrase, "the term of this contract." The defined term is "a term of two years from date hereof," November 25, 1914. The following words, "from term to term thereafter until this agreement is terminated as hereinafter provided," do not explicitly define the duration of any term. The negative covenant may well be limited to the defined term of two years. Upon the plaintiff's construction we should be obliged to enlarge the language of the covenant and to read it, "during the continu-

ance of this contract," thereby including any subsequent or additional terms which might result from any failure to give notice of a desire to terminate. We do not find a clear intention of the defendant to be bound by the negative covenant for an indefinite period, or for further terms each of two years and three months. That the defendant was willing to restrict the use of its premises during a defined term of two years or of two years and three months, does not indicate a willingness to be restricted indefinitely or throughout any future period of contract relations. We see no reason why the contract relations might not well continue between the parties after the restriction upon defendant's use of its premises had ceased at the end of two years. It is in evidence that there are many contracts of this character which are in successful operation without the aid of a negative covenant like this.

Furthermore, we think the terms of the contract relating to notice of desire to terminate are not so precise that neither party could misunderstand them. They provide for notice within thirty days "after the expiration of any contract period." The meaning of the words "any contract period" is not clear. The plaintiff contends that it is a term of two years from date, but owing to the peculiarity of the provision that notice of a desire to terminate must be given within thirty days after the expiration of any contract period, it results that the minimum period for which the parties were bound upon execution of the contract is a period of two years and at least three months
174 and one day; not a period of two years, which is the ostensible "term" of the contract.

Ordinarily a provision for notice of termination is required to be given within the defined contract period and is not employed for the purpose of extending the original period of obligation. The present contract is unusual in this respect. As a result, the words "any contract period" may refer either to the defined term of two years, or to the additional period of not less than three months and one day, or to the combined periods of two years and three months and one day.

Within thirty days after the expiration of this combined period of two years and three months, the defendant, by its letter of March 21, 1917, though somewhat informally, gave notice of its desire to terminate. The letter, it is true, stated a preference to discontinue in less than three months. Nevertheless it requested discontinuance at the earliest possible date, which fairly means at least at the end of the period of three months to which the letter refers. The plaintiff's letter in reply expressly refused to recognize, but, on the contrary, denied the defendant's right to terminate at three months' notice, and asserted that the defendant was under engagement for the next two years. It thus appears that whatever be the true construction of this unusual and somewhat complicated contract, its terms are not so precise that neither party could resonably misunderstand them.

Upon the question of the application of the Clayton Act we express no opinion.

We affirm the judgment of the District Court, not for the reasons assigned in its opinion, but on the ground that the negative covenant, if valid and not prohibited by the Clayton Act, does not justify the

interposition of the extraordinary powers of a court of equity to grant the special relief sought.

The decree of the District Court is affirmed, reserving the right of the appellant to make application to that court under Equity Rule 22 to transfer its suit to the law side of that court; and the appellee recovers costs in this court.

175 United States Circuit Court of Appeals for the First Circuit.

THE STANDARD FASHION COMPANY, Plaintiff-Appellant,

v.

MAGRANE-HOUSTON COMPANY, Defendant-Appellee.

Petition for Rehearing.

Now comes The Standard Fashion Company, plaintiff-appellant, and respectfully petitions this court for a rehearing of the above-entitled appeal because of alleged errors in the opinion of the court.

I.

This court decided the appeal upon grounds not argued by either party nor suggested in any way by the opinion of the court below. Neither in the arguments of counsel nor in the opinion of Judge Johnson was it suggested that the damages for breach of the contract could be adequately computed nor that there was ambiguity in the contract with respect to its term or anything else. The Clayton Act furnished the only ground of defense relied on by the defendant. What the plaintiff now asks is in reality not a rehearing but an original hearing upon the matters dealt with in the opinion of this court.

176 II.

This court seems to have based its decision principally upon the conclusion that there is ambiguity in the contract with respect to its term and particularly with respect to the duration of the negative covenant. The defendant has not contended that there was such ambiguity. The trial court apparently found no such ambiguity. It found unhesitatingly that the contract had not been terminated (Record, p. 13) and that it continued in force with respect to the negative covenant as well as the rest of its provisions "unless it can be successfully attacked" under the Clayton Act. This finding has never been challenged in any way by the defendant. On the contrary, the fact that the contract, if not obnoxious to the Clayton Act, was still in existence was assumed by both parties in their briefs and arguments in this court. If, contrary to this assumption of counsel, the case is now to be decided upon the ground suggested by this court, the plaintiff feels that it should have at least one opportunity of submitting an argument upon the point.

III.

The fact that the plaintiff established an agency with the R. H. White Co. while the contract between the plaintiff and the defendant was in force does not warrant the denial to the plaintiff of equitable relief.

Not only was the establishment of such an agency entirely consistent with the plaintiff's contract with the defendant, but it involved no conduct on the part of the plaintiff that was inequitable in any sense. Indeed, at the very time when the contract between the plaintiff and the defendant was made and for some time thereafter, the plaintiff had two other agencies in the retail district of Boston, one much nearer the defendant's store than is that of the R. H. White Co. (pp. 36-7).

The plaintiff was entitled to the profits on such business as it could secure through the agency at the R. H. White Co. in addition
177 to such profits as it could secure through the sale of its patterns in the defendant's store, and neither in a court of law nor in a court of equity can the defendant complain of the opening of the agency in the other store. The suggestion of the defendant (Ex. 9, p. 162) that its desire to terminate its contract with the plaintiff was the result of the agency contract made by the latter with the White Co. is shown by the evidence to be only a subterfuge, as the defendant made its contract with the McCall Co. before the plaintiff made its contract with the White Co. (See plaintiff's brief, pp. 4-5.)

The White contract was furthermore made after the defendant had failed to give notice of a desire to terminate its contract with the plaintiff within thirty days after the expiration of the first two year period. In reliance upon the fact that the latter contract would continue for a further period of two years, the plaintiff inserted in the White contract a provision binding it not to establish an agency other than with the defendant within one-half mile of the White store. (Record, pp. 50, 51.) This provision precludes plaintiff from obtaining any other agency in the Boston dry goods district to replace that in the defendant's store. For this reason, the White contract should form a basis for equitable relief instead of a reason for denying such relief.

This court appears to treat the establishment of the White agency as impairing the plaintiff's right to equitable relief on the ground that in some way it affects the plaintiff's contention that it is damaged "to an amount not calculable in money." It is impossible to see how the existence of the agency with the R. H. White Co., whether it affects the amount of the damages or not, can render it easier to calculate that amount in dollars and cents or render the plaintiff's remedy at law in any respect more certain, complete, and adequate. The damages sought by the plaintiff for breach of the negative covenant and the consequent diversion of business to a competitor cannot possibly be determined in dollars and cents. Even if the damage suffered by the plaintiff because the defendant ceased to handle its patterns could be found to be diminished at all

by the existence of the White agency, the existence of that
178 agency cannot possibly affect the amount of damage which results from the defendant's further act of establishing in its store an agency of a competitor of the plaintiff. In no event can the existence of the White agency make the plaintiff's damages for breach of the negative covenant more susceptible of computation.

In its opinion the court after calling attention to the establishment of the agency with the R. H. White Co. says:—

"That the loss of the defendant's agency during the unexpired term of the contract damages the plaintiff, under these circumstances, to an amount not calculable in money, we are not prepared to believe" * * *

How can it possibly be claimed that the circumstances stated have any bearing upon the ability to compute in dollars and cents the damages, not for the loss of the agency, but for the breach of the negative covenant and the establishment of a competing agency with its consequent diversion of trade? If the defendant had discontinued its relations with the plaintiff without installing a rival pattern, the only element of damage would have been the loss of the agency and this is the only element of damage to which the court in the passage above quoted referred. The defendant, however, went beyond this and obviously inflicted further damage upon the plaintiff by establishing an agency for the McCall patterns. The additional damage resulting from this, which this court apparently has not considered at all, is naturally not susceptible of computation. All of the evidence introduced by the plaintiff on the question of damages related to the damages which it suffered from the loss of the agency. None of it related in any way to the damage resulting from the breach of the negative covenant. Even with reference to its damages for loss of the agency, the plaintiff necessarily could not go beyond evidence of the profit which it might have made in the defendant's store. There was obviously no way of showing its loss on such sales, outside of the defendant's store, as would have been induced by the distribution of 75,000 Standard Fashion Sheets per year by the defendant to persons who purchased their patterns elsewhere.

179 IV.

That damage of this sort cannot be shown in dollars and cents had been recognized by all of the courts before which the question has come as a reason for granting equitable relief. No court has ever held that damages from breach of such a covenant can be computed. While the Massachusetts case of Butterick Publishing Co. v. Fisher and the similar cases in other state courts are of course not "binding" upon this court, they were referred to as being decisions of some of the most highly esteemed state courts in the country and as being not only persuasive in their reasoning but in accordance with the uniform current of authority in the federal as well as in the state courts. If there are any differences, as suggested by this court, between these decisions of the state courts and the present case, the

differences are entirely immaterial so far as concerns the possibility of computing the damages from the breach of the negative covenant. The fact that in those cases the agency had not been actually opened means merely that the damages were much less than in the present case, for here after the agency had continued in existence for more than two years a trade had necessarily been built up among the defendant's customers which was of value to the plaintiff and which the defendant certainly should not be allowed to divert to a competitor of the plaintiff.

In the Massachusetts case the court treats the lack of adequacy of the remedy at law for breach of the negative covenant as being obvious. Loring, J., said (203 Mass., at p. 131):—

"The defendant's covenant not to sell or permit to be sold on his premises any other make of patterns is a covenant where the thing contracted for cannot be purchased by the plaintiff, and where damages are not an adequate compensation."

In Standard Fashion Co. v. Siegel Cooper Co., 30 App. Div. 564; aff'd in 157 New York 60, Judge Morgan J. O'Brien, speaking for the Appellate Division, said in language expressly approved by the Court of Appeals: —

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"It cannot be doubted that Courts are instituted to enforce rights, to redress injuries and to restrain contemplated wrongs, and it is difficult to see any sound reason which should prevent a Court from granting any relief, because it cannot give all the relief to which the party may be entitled. We think that no sound principle is violated in holding that the Court should extend its relief as far as it is able, and where it cannot, as in this case, enforce the specific performance of the affirmative covenants by compelling the defendant to carry out its contract, it has the power, and it should exercise it, to prevent the defendant, the Siegel Cooper Company, from obtaining an advantage from a breach of its agreement, and inflicting a double wrong, first, in depriving plaintiff of the right to sell, and, secondly, by conferring such rights on a business competitor."

In affirming the order of the court below the New York Court of Appeals based its decision in large part upon the authority of the federal cases concerning negative covenants, including some of those cited on page 14 of the plaintiff's brief in this case, and also certain others (157 New York, at p. 67).

The rule that an injunction may issue to restrain the breach of a negative covenant, though specific performance of the affirmative covenants cannot be decreed, is nowhere better settled than in the federal courts. It happens that perhaps the leading decision is that of Judge Lowell of this Circuit in Singer Machine Co. v. Union Buttonhole Co., Fed. Cas. No. 12,904 (C. C. Mass.), a case which has been cited and followed over and over again.

In addition to the cases cited on page 14 of the plaintiff's brief see Chicago & A. Ry. Co. v. N. Y. L. E. & W. R. Co. 24 Fed. 516 (C. C. S. D. N. Y.), and also the very late case of Automobile Ins. Co. v. Guaranty Securities Corporation, 240 Fed. 222 (D. C. S. D. N. Y.)

in which the decision in Standard Fashion Co. v. Siegel Cooper Co., 157 N. Y. 60, is discussed and approved.

The negative covenant in the contract in question is not, it
181 is respectfully submitted, "auxiliary" to the performance of "the other covenants of the contract," as stated by this court in its opinion, but creates an additional and distinct obligation the breach of which, concurrently with the breach of the affirmative covenants, leads to the infliction of what Judge O'Brien calls in the passage above quoted "a double wrong upon the plaintiff." It is the breach of the negative covenant that makes the wrong a double one. For this branch of the wrong equitable relief is clearly necessary to prevent substantial injustice.

It is further submitted, with respect, that this court has overlooked a principle recently reaffirmed by the Supreme Court of the United States. In the very late case of Union Pacific R. R. Co. v. Board of Commissioners of Weld County, 38 Sup. Ct. Rep. 510, decided June 3, 1918, the court held that where the remedy at law is doubtful, a court of equity will not decline cognizance of a suit on account of the existence of a legal remedy, quoting and reaffirming the following passage from the opinion in Davis v. Wakelee, 156 U. S. 680, 688:

"It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, the plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

It may not be amiss to remind the court that the defendant by its answer admits the allegations of paragraph 8 of the bill of complaint to the effect that the defendant has not only sold on its premises the patterns of the McCall Co., but that it

"has not paid proper attention to the sale of Standard patterns, but, on the contrary, has paid attention to the sale of said McCall patterns, and the defendant has not conserved the best interests of the agency for Standard patterns, but, on the contrary, has conserved the best interests of the McCall Co., plaintiff's competitor, by the sale of said McCall patterns and by the distribution of large quantities
of McCall Fashion Sheets and has diverted the trade of plain-
182 tiff's patterns among the defendant's customers to the said McCall Co."

and

"unless restrained by order of this court the defendant intends to continue the sale of said McCall patterns and to continue the aforesaid breach of said contract."

V.

The decisions of the Supreme Court of the United States referred to on page 2 of the opinion of this court seem to have but a very remote bearing upon the issues presented upon this record.

In Javierre v. Central Altagracia, 217 U. S. 502, in which this court says that

"the issue of an injunction to enforce a negative covenant of this character was disapproved,"

it appears upon an examination of the report of the case that there was no negative covenant in the contract. It appears, on the contrary, that the defendant had merely contracted to sell and deliver to the plaintiff all his sugar-cane for a certain period. It was a contract of which specific performance would not be decreed, and the court objected to what it termed "the half-way relief of an injunction" restraining the defendant from delivering sugar-cane to some one other than the plaintiff.

The existence of the negative covenant is the crucial element in cases of this character. If it is present the injunction will be granted. If it is absent, it will be denied, as in Butterick Publishing Co. v. Boynton, 191 Mass. 175, which differed from the Fisher case only in the absence of the negative covenant.

In Dalzell v. Dueber Watch Case Mfg. Co., 149 U. S. 315, it was merely held that specific performance of an alleged oral contract would not be decreed without clear and satisfactory proof of the making of the contract set forth in the bill.

So in Coulson v. Thompson, 2 Wheat. 335, the alleged
183 contract was oral, and the court held that the plaintiff had not sufficiently proved that it was ever made. The opinion concludes with this statement:

"Thus it appears that the complainant has failed not only to prove the contract stated in the bill, but also his performance of those acts which form the consideration of the alleged promise on the part of the defendant."

It is submitted that these cases are not authority, and that there is no authority, for the proposition that a written contract, admitted to have been duly executed by the parties, will not be enforced in equity merely because its language might be conceivably capable of different constructions; and with especial confidence it is submitted that there is no principle which should lead a court, in order to decline taking jurisdiction in equity, to search a contract for ambiguities which never occurred to either party to the contract and are not asserted by either party to exist.

VI.

In the present case the court finds that in two particulars the contract is not "so clear in its terms that neither party could reasonably misunderstand them." It is submitted in the first place that this cannot be of any consequence except in a case where one of the parties comes into court and says that he has misunderstood the terms of the contract, and secondly that in the present case there is no ambiguity.

The first point made by the court is that the phrase "during the

term of this contract," in the negative covenant, is ambiguous, as the term is not explicitly defined and it might be contended that the negative covenant was to apply only during the initial period of two years or of two years and three months. The defendant makes no such contention. As to this the plaintiff contends in the first place that it would be very unusual if a contract which by its terms is to continue for an indefinite period unless terminated by one of
184 the parties at stated times should be held as to one of its obligations to terminate necessarily at a certain fixed date, leaving all the rest of the obligations in effect throughout the term of the contract.

See Great Northern Ry. Co. v. Manchester, etc., Ry. Co., 5 De G. & S., 138, 147.

Surely any one who contends that a particular clause in a contract, subject to periodical renewal in the absence of a notice to terminate, drops out of the contract at the time of the first renewal, must have the burden of showing that the contract so reads. It is obvious that if the negative covenant had been intended to continue only two years, it would have been so expressed in the contract.

Neither party to this contract for one moment believed, or now claims to have believed, that the negative covenant was not to survive during the entire life of the contract, however long that might be.

It is respectfully submitted that there is no more real ambiguity with respect to the other clause commented on by the court. The contract provides that it shall continue "for a term of two years from the date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided." There is no further reference to the term or duration of the contract until the provision is reached concerning the right to terminate it. That provision is as follows:

"Either party, desirous of terminating this agreement, must give the other party three months' notice in writing within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months."

The sole question would appear to be, what is meant by the words "any contract period as above specified." There can be but one answer: Any contract period is any term of two years, either the original term or a later one. There is no other period "above specified" anywhere in the contract.

The words quoted in the opinion of this court are only a
185 part of the clause as it reads in the contract. The words "after the expiration of any contract period" might perhaps have a different meaning from the words "after the expiration of any contract period as above specified." The court appears to overlook these last words, as well as the correlative provision at the beginning of the contract to the effect that it shall continue "for a term of two years * * * and from term to term thereafter until this agreement is terminated, as hereinafter provided."

It may be noted that there is no reference in the contract to three

months except in the very sentence which refers to "any contract period as above specified." It cannot possibly be contended that any such term as two years and three months is "above specified."

The contract provides that the agency shall "continue regularly" for three months after the notice of termination is given. The notice of termination cannot be given until after "the expiration of any contract period." Since these three months must come after the "expiration of any contract period," they cannot be properly construed as forming part of any such contract period. This Court, therefore, we respectfully submit, is in error in finding (Opinion, p. 4) that the words "any contract period" "may refer * * * to the additional period of not less than three months and one day, or to the combined periods of two years and three months and one day."

The plaintiff contends that these provisions of the contract are perfectly clear on their face and are reasonably susceptible of only on construction, namely, that the term of the contract is for successive periods of two years each, subject to the right of either party to terminate it upon proper notice given within thirty days after the expiration of any two-year period. The contract was so construed by the plaintiff. The defendant has not argued that the construction is not proper. It was so construed by Judge Johnson. It is presumably so construed by this court, which has reserved to the appellant the right to make application for the transfer of the suit to the law side of the court, obviously on the theory that the contract had not been properly terminated.

186 It may be added that the defendant never made any such contention as is now suggested by the court. Its letter of March 21, 1917, which happened to be sent within thirty days after the expiration of two years and three months from the date of the contract, was not intended as a notice of termination. The formal notice, which was sent on April 7, 1917, and which is relied upon in the answer (Record, p. 9) and also in the defendant's brief filed in this court (p. 2) as being notice under the contract, was sent more than thirty days after the expiration of the two years and three months. With respect to this point the position taken by the defendant, in its answer, was that the contract "should be constued as binding the defendant for two years and from time to time thereafter until notice of its termination was given" (p. 10), so that the notice might be given at any time after the expiration of two years. This point was so obviously without merit that it appears to have been abandoned by the defendant after the filing of its answer as there is no suggestion of it in the brief filed in this court. Indeed, there is no suggestion anywhere in that brief that either of the alleged ambiguities pointed out by this court ever occurred to the defendant.

Wherefore the plaintiff petitions for a rehearing of the appeal.

STANDARD FASHION COMPANY,
By HERBERT NOBLE,
JAMES B. SHEEHAN,
ROBERT G. DODGE,
Its Attorneys.

I, Robert G. Dodge, of counsel for the appellant, certify that I have examined the foregoing petition and that in my opinion the said petition is well founded and meritorious, and is entitled to the consideration of the court.

ROBERT G. DODGE.

187 United States Circuit Court of Appeals for the First Circuit, October Term, 1918.

No. 1343.

THE STANDARD FASHION COMPANY, Plaintiff, Appellant,

v.

MAGRANE HOUSTON COMPANY, Defendant, Appellee.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Bingham, Anderson and Brown, JJ.

Opinion of the Court.

June 28, 1919.

ANDERSON, *J.:*

After the per curiam opinion of June 28, 1918, the plaintiff petitioned for a rehearing. The petition was granted. The plaintiff has orally and on brief elaborately re-argued the case. On careful reconsideration we are constrained to adopt the construction of the contract urged by the plaintiff and made by the court below.

Construing the contract as a whole, we do not think it can fairly be held so ambiguous as, if valid in all its provisions, to warrant the court in refusing the injunction prayed for.

The contract runs for a term of two years from date and "from term to term thereafter until this agreement is terminated as hereinafter provided." The provision for termination is:

"Either party desirous of terminating this agreement must give the other party three months' notice in writing within thirty
188 days after the expiration of any contract period as above specified, the agency to continue regularly during such three months."

The contract is dated November 25, 1914. Its first two-year term ran to November 25, 1916; failing the three months' notice within thirty days thereafter, the contract then ran until November 25, 1918. Then for thirty days there was another opportunity to give the three months' written notice of termination. And so on from term to term.

We think the negative covenant (assuming for the moment it and the rest of the contract to be valid) is applicable to the entire life of the contract construed as to duration as we have indicated; that the contract shows a clear intention of the defendant to be

bound for successive terms of two years, and for three months after notice of termination. We adopt, therefore, the construction put upon the contract by the court below.

We also agree with the District Court that the contract does not establish an agency "properly so termed," but that it is a contract for sale. The case is easily distinguishable in this regard from Willcox & Gibbs Co. v. Ewing, 141 U. S. 627. Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers.

See the cases collected and to some degree discussed in

Ford Motor Company v. Union Motor Sales Co., 244 Fed. 156,

and

Ford Motor Company v. Benjamin E. Boone, Inc., 244 Fed. 335.

Cf. Mechem on Agency, Sec. 44-48, and cases cited;
Mechem on Sales, Sec. 41 et seq.;
2 Corpus Juris, pp. 442, 423.
John H. Pray & Sons Co. v. Appledore L. & Bldg. Co., 76 N. H. 167.
Bendix v. Staveo Corridge Co., 174 Ill. App. 589, 595.

An agency is not created simply by calling a contract for sales an agency contract.

We may test the question whether the defendant was the
189 plaintiff's agent engaged in selling the plaintiff's goods, or a vendee selling its own goods, by querying whether the plaintiff could be held liable in tort for the defendant's material and false misrepresentations made to a customer,—such misrepresentations, for instance, as that patterns sold embodied the latest Paris fashion when in fact they were obsolete. Obviously, if the defendant was the plaintiff's agent, its misrepresentations, made in the course of the business of the agency, would bind the plaintiff. We think the plaintiff would be surprised to find this or any other court holding it responsible for such tortious conduct of the defendant with relation to the sale of these patterns.

The plaintiff admits that the notice of termination given by the defendant on April 7, 1917, followed by this suit brought on July 25, 1917, must be deemed applicable to the term of the contract expiring on November 25, 1918, as though given within thirty days after November 25, 1918. The plaintiff consequently admits that its right to an injunction expired on February 25, 1919.

But the plaintiff insists that the fact that relief by injunction has now become inappropriate by reason of lapse of time does not warrant the court in refusing to retain jurisdiction in equity for the purpose of granting any appropriate relief, though it be only for the assessment of damages.

Clark v. Wooster, 119 U. S. 322;
Busch v. Jones, 184 U. S. 598;
Cartwright v. So. Pacific, 206 Fed. 234;
Beedle v. Bennett, 122 U. S. 71;
County of Mobile v. Kimball, 102 U. S. 691.

Assuming for the moment that the contract and all the stipulations thereof are valid, the great weight of authority is in favor of the plaintiff's proposition that it was entitled to an injunction against a breach of the negative covenant.

Butterick Publishing Co. v. Fisher, 203 Mass. 122;
Standard Fashion Co. v. Siegel-Cooper Co., 30 App. Div. 564; 157 New York, 60;
Butterick Publishing Co. v. Chabot, N. Y. Law Journal, July 21, 1908; affirmed 128 App. Div. 900;
190 Butterick Publishing Co. v. Rose, 141 Wis. 533;
Peerless Pattern Co. v. Gauntlett Dry Goods Co., 171 Mich. 158.

We think, therefore, that the plaintiff's contention that it is now entitled to a decision from this court either affirming or reversing the decision of the District Court must prevail. The plaintiff insists, and rightly, that the gist of the case is whether the Clayton Act invalidates its contract in whole or any part, and that the fact that its right to an injunction has expired pendente lite, does not relieve the court from the duty of determining the issues admittedly alive and involving substantial rights at the time of the argument of the appeal in this court.

Does Section 3 of the Clayton Act invalidate the negative covenant in this contract? We think it does and that the decision of the District Court in that regard must be affirmed.

The mere fact that Congress enacted the Clayton Act after numerous courts had held similar or analogous restrictions not obnoxious to the Sherman Act, or invalid at common law, or under State anti-trust statutes, grounds an inference that the legislature intended, in the light of actual experience, to change the law.

Butterick Pub. Co. v. Fisher, 203 Mass. 122.
Brown v. Rounsavell, 78 Ill. 589;
Southern Fire Brick & Clay Co. v. Garden City Sand Co., 223 Ill. 616;
Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373;
Ferris v. American Brewing Co., 155 Ind. 539;
J. W. Ripy & Son v. Art Wall Paper Mills, 41 Oklahoma, 20;
In re Greene, 52 Fed. 104;
Mogul Steamship Co. v. McGregor, 1892 A. C. 25;
Whitwell v. Continental Tobacco Co., 125 Fed. 454;
Peerless Pattern Co. v. Gauntlett Dry Goods Co., 171 Mich. 158;
Sullivan v. Rime, 35 S. Dak. 75;
Standard Fashion Co. v. Siegel-Cooper Co., 30 App. Div. 564; 157 New York, 60;
191 Butterick Publishing Co. v. Chabot, N. Y. Law Journal, July 21, 1908; affirmed 128 App. Div. 900;
Butterick Publishing Co. v. Rose, 141 Wis. 533.

There is no answer to the suggestion of Judge Trieber in U. S. v. United Shoe Machinery Co., 234 Fed. 127, 150, that the "presump-

tion is, not that Congress intended that the construction of the Sherman Act should control, but on the contrary that it should not control." And again quoting from Judge Trieber: "Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do these acts, which may put it in his power to do so."

The very title of this act is significant—"An Act to supplement existing laws against unlawful restrictions and monopolies and for other purposes."

In the report of the Senate Committee on Judiciary upon this bill is the following statement of the legislative purpose:—

"Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing anti-trust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned discrimination in prices for the purpose of wrongfully injuring or destroying the business of competitors; exclusive and tying contracts; holding companies; and interlocking directorates."

In the report of the House Committee there is also instructive language concerning section 3:—

"Let us therefore consider what this section really accomplishes. It prohibits the exclusive or 'tying' contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. It is designed merely to prevent this unfair trade practice now so common throughout the country, and which is generally regarded by everyone who has given the subject any serious consideration as unjust to the local dealer and to the community and as monopolistic in its effects."

192 "What is the motive and purpose of the manufacturer in making or entering into such exclusive contract? It is undoubtedly his purpose to drive out competition and to establish a monopoly in the sale of his commodities in that particular community or locality. His contract by its express terms completely shuts out competition in the business of the local dealer with whom he makes it. The dealer bound by this exclusive contract not to handle the goods, wares, and merchandise of another becomes the ally of the manufacturer in his effort and purpose to drive out competition in the locality or community in which such commodities are sold. This is done by means of extensive advertising, and let it be borne in mind also that this advertising is added in the price of the commodities and paid for by the consumer. If by the combined efforts of the manufacturer and the local dealer and the glowing and overdrawn and oftentimes false advertisements competitors are com-

pelled to retire from the field, a monopoly in the particular community or locality is the invariable result. In this connection it is important to state that today in every village and locality where there is only a single store and this exclusive or 'tying' contract is entered into between the manufacturer and the local dealer concerning any commodity, the exclusive or 'tying' contract gives both the manufacturer and the local dealer a complete monopoly of that particular commodity in the locality or community. That the effect of such a system is detrimental to the consumers and to the general public cannot be questioned for a moment.

"The public is compelled to pay a higher price and local customers are put to the inconvenience of securing many commodities in their communities or through mail-order houses that cannot be procured at their local stores. The price is raised as an inducement. This is the local effect. Where the concern making these contracts is already great and powerful, * * * the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. * * * When we consider contracts of sales made under this system, the result to the consumer, the general public, and the local dealer and his business is even worse than under the lease system."

193 For present purposes, the fact that this section was amended in conference before final enactment we regard as of little or no significance. The reports of the two committees illuminate the evils and dangers in the trade situation with which Congress was undertaking to deal. As frequently happens, debate and conference modified the legislators' views as to the best method of dealing with the evils aimed at. But we find no abandonment of the main purpose expressed in these committee reports. Restrictions of this sort that may substantially lessen competition or tend to create a monopoly are condemned as strongly in the final as in the original draft. Competition, actual or potential, was the object of the Congressional solicitude.

But we do not think it necessary to resort to the reports of the Congressional Committee or to debates in Congress in order to reach a confident conclusion as to the application of this statute to the contract between the plaintiff and defendant. Section 3 reads as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement

or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The contract now before the court provides in the plainest possible language that the purchaser shall not "sell or permit to be sold * * * on its premises * * * any other make or pattern and not to sell Standard patterns except at label prices." In effect the plaintiff admits that the only way of escape from the condemnation of the statute is for the court to hold that this negative covenant may not "substantially lessen competition or tend to create a monopoly."

No such finding can be made. Observe at the outset that the condemnation of the statute runs * * * "where the effect of
194 * * * such negative covenant * * * "may be to substantially lessen competition or tend to create a monopoly." The language is "may be," not "is" or "will be."

In order to condemn the negative covenant, it is not necessary that the court should find that it will lessen competition or will tend to create a monopoly; it is enough to find that it may lessen competition or may tend to create a monopoly.

On this record we are constrained to find that this restriction may substantially lessen competition and may tend to create a monopoly. It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern companies control approximately two-fifths. The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.

We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances, we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition or may tend to create a monopoly,—or both,—and is therefore obnoxious to the Clayton Act.

See Chicago Board of Trade v. United States, 246 U. S. 231, 238.

To avoid possible misconception of this opinion, we add that we do not overlook that the contract in question also contains a stipulation to maintain resale prices. The validity of this provision is not

raised by the pleadings, nor has it been discussed by counsel.
195 Whether under the circumstances of this case such resale price stipulation is invalid, we do not decide.

Bauer v. O'Donnell, 229 U. S. 1;
Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373;
Ford Motor Co. v. Union Motor Sales Co., 244 Fed. 156;
Strauss v. Victor Talking Machine Co., 243 U. S. 490;
Motion Picture Co. v. Universal Film Co., 243 U. S. 502;
United States v. Kellogg Toasted Corn Flake Co., 222 Fed. 725, 728.
Boston Store v. American Graphophone Co., 246 U. S. 8.

Our decision that the negative covenant cannot be enforced is enough to dispose of this case as a suit in equity. The pleadings do not raise, and we have not undertaken to consider and determine the question of what rights, if any, the plaintiff may have, in some other action, to recover either for goods sold and delivered, or for damages for breach of the contract. Whether the invalid negative covenant and the resale price stipulation,—either or both,—taint the whole contract and all sales made in the course of the business contemplated by such contract, we do not decide. See

Continental Wall Paper Co. v. Voight, 212 U. S. 227;
Connolly v. Union Sewer Pipe Co., 184 U. S. 540;
Wilder v. Corn Products Co., 236 U. S. 169;
McMullen v. Hoffman, 174 U. S. 639;
Roselle v. Beckemeir, 134 Mo. 380;
Fishell v. Gray, 60 N. J. L. 5;
Rosenbaum v. U. S. Credit Co., 65 N. J. L. 255;
King v. King, 63 Ohio St. 363;
1 Parsons on Contracts, 9th Ed. p. 496;
Wall's Pollock on Contracts, p. 484 and cases and notes;
Pullman Car Co. v. Transportation Co., 171 U. S. 138, 151;
Harriman v. Northern Securities Co., 197 U. S. 244;
Bone v. Ekless, 5 H. & N. 924;
Thomas v. Richmond, 12 Wall., 349, 356;
Boylston Bottling Co. v. O'Neil, 121 Northeastern, 411, a decision by the Massachusetts Supreme Judicial Court on January 2, 1919.

The decree of the District Court is affirmed with costs.

196 BROWN, *J.*:

Full weight must be given to the final clause of Section 3 of the Clayton Act:—

"where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

In determining the effect we must consider the thing upon which the effect is to be produced. This clause seems to require that the

interpretation and application of Section 3 of the Clayton Act should be according to the principles stated in the opinion of Mr. Justice Brandeis in Chicago Board of Trade v. United States, 246 U. S. 231, 238:—

"But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may depress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

To predict the consequences of the defendant's agreement not to sell or permit to be sold on its premises, during the term of the contract, any other make of patterns, it is necessary to consider the peculiarities of the particular business to which the contract relates. We must also consider that the restraint is upon the use of the premises of the defendant for a limited period. See 251 Fed. 559, 560. It is evident that a restriction of this character did not constitute an inducement to the defendant to enter into the contract for carrying a stock of the plaintiff's goods. It is also evident that so long as the defendant remained satisfied to carry only the single line of dress patterns that it had chosen, the agreement not to carry another
197 line of goods was of no practical effect. It is operative to exclude competitors only in those cases where a customer may desire to add a second stock, or to abandon his contract during its term. Of the exclusion of competitors which results from the fact that the wants of customers are supplied by the plaintiff, no complaint can be made.

The misapprehension as to the actual or probable effect of restrictions of this character as a means of introducing goods to the trade and of building up a monopoly was pointed out by the Supreme Court in United States v. United Shoe Mchry. Co., 247 U. S. 32, 66:—

"Besides, it is impossible to believe, and the court below refused to find, that the great business of the United Shoe Machinery Company has been built up by the coercion of its customers and that its machinery has been installed in most of the large factories of the country by the exercise of power, even that of patents. The installations could have had no other incentive than the excellence of the machines and the advantage of their use, the conditions imposed having ade-

quate compensation and not being offensive to the letter or the policy of the law;"

and by the court in United States v. United Shoe Mchry. Co. of N. J. et al., 222 Fed. 349, 414:—

"It is impossible to believe that defendants' equipment is in so many shoe factories for any other substantial reason than the merits of what they had had to offer. To say that this is due, in any substantial degree, to the fact that its leases run beyond the terms of patents, or because of the exclusive use, prohibitive, or cancellation clauses, rests largely, if not entirely, upon assumption. But that the business of these defendants rests upon the lease provisions objected to in such a substantial amount as to constitute any factor of independent force in securing or maintaining a monopoly does not appear."

This was said in connection with contracts of a duration as long as seventeen years, and applies with especial force to short-term contracts like that before us. It also was said in the opinion in that case (222 Fed. 407):—

"A business contract, like a statute, is not to be upset 'upon hypothetical and unreal possibilities if it would be good upon the facts as they are.' Pullman v. Knott, 235 U. S. 23."

198 In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of "possibility" arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a "dangerous probability."

In the present case there is no evidence that any competitor of the plaintiff had ever been excluded from competition in the city of Boston or elsewhere because of inability to procure customers or a store in which he might market his goods. If the defendant desired to defend upon the ground that this contract, by reason of its effect upon the trade, was illegal, it was incumbent upon it to allege and prove such facts as would enable the court to make a reasonable prediction of consequences. Ford Motor Co. v. Benjamin E. Boone, Inc., 244 Fed. 335, 342. No such defence is made by the answer.

The defendant sets up in its answer that the plaintiff is a combination in restraint of trade, and that it is seeking an injunction against the defendant for the purpose of preventing competition and to establish a monopoly. The answer that the plaintiff is an unlawful combination of course states no defence.

The facts before us were brought out principally in the direct testimony of the plaintiff and upon cross-examination. They tend to show that the ordinary purchaser from the plaintiff is required to maintain a considerable stock of dress patterns which soon go out of style, and have to be renewed by exchange, and that a single stock meets all the requirements of the ordinary dealer at retail. This being the case the exclusion of competitors would presumably result from the fact that the plaintiff's customers were supplied and did not

desire to duplicate their stocks, but preferred to concentrate their efforts on the goods of their choice, rather than from any agreement not to handle the goods of others. It also appears that there are but few stores which handle more than one line of dress patterns, and that in some cases special contracts are made permitting it.

From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon its face, and that
199 the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect, and in recognition of the fact that where there is an established monopoly competition cannot be instituted or maintained unless the new competitor in the field can make a contract with someone to handle only its own goods and not to handle the goods of a company already dominating the field; that if such contracts were to be condemned irrespective of the trade in which they were made this might lead to effective suppression of competition, by enabling an established monopoly to place its goods in the shop of every competitor.

I am of the opinion that this Court should not, upon this record and upon so incomplete a state of proofs, determine the invalidity of this contract. The question of the plaintiff's right, at the time of bringing his bill, to an injunction to restrain a breach of the negative agreement concerning the use of the premises, in spite of the authorities cited, is still very doubtful on principle.

The doctrine of Lumley v. Wagner 1 De G. M. & G. 604, has been much questioned. Lindley, L. J., said he looked upon Lumley v. Wagner "as an anomaly which it would be dangerous to extend." See Fry on Specific Performance, 5th Ed., Secs. 860, 861, 862. In Sections 857 and 858 the difficulties in distinguishing between express and implied negatives are discussed. So far as the negative agreement is not to do that which as a matter of fact is inconsistent with an affirmative and lawful agreement, it may be regarded as mere surplusage. It is only where the negative agreement goes beyond what is inconsistent with an affirmative and lawful agreement that it can be regarded as unreasonable. That a court of equity, while recognizing its inability to compel specific performance of a contract, should nevertheless, by injunction, put compulsion upon a defendant who is answerable at law for his breach of contract, may result merely in the imposition of a penalty; and penalties are not favored in equity. The defendant's agreement not to use its premises for the sale of the goods of others was to fortify the agreement to

200 "pay proper attention to the sale of plaintiff's patterns and to conserve the best interests of the agency at all times."

Ordinarily a party to a business contract for the purchase of goods may elect to break his contract and pay full damages. For a court of equity to put compulsion upon him by way of punishment for re-

fusing to perform the contract is beyond its powers; and to attempt coercion without power to make it effective is too doubtful an experiment. In view of the decision of the Supreme Court in Javierre v. Central Altagracia, 217 U. S. 502, it is doubtful if the Supreme Court will approve the extension of the doctrine of Lumley v. Wagner to a contract like that involved in the present case.

I am of the opinion that on the present record we cannot properly determine that the contract is invalid under the Clayton Act. The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden is upon him who asserts illegality. The application of the statute should be made only upon full proofs. The consequences of applying it otherwise are too serious to be disregarded. The power of Congress to enact this statute is based upon the power to regulate interstate commerce. It may make an interstate contract illegal by reason of the incorporation therein of conditions relating to commerce of a purely local character, not within the power of Congress to regulate when not associated with an interstate contract. It would seem to follow that we cannot separate from the interstate commerce features of the contract the features that relate to a business wholly local, and nullify those features only, since this is directly inconsistent with the theory that by virtue of their connection with an interstate commerce contract Congress, in the exercise of its power over interstate commerce, may provide that—

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale * * * on the condition," etc.

In view of the long continuance and wide extension of the method of doing business, through what the Supreme Court
201 & 202 in Wilcox & Gibbs Co. v. Ewing, 141 U. S. 627, regarded as agency contracts, and of the long established trade usage of describing such contracts as agency contracts, irrespective of the fact that the title to the goods may pass from vendor to vendee, there must be a large body of outstanding contracts which might be so completely nullified that no recovery can be had by the vendors for goods that they have furnished under such contracts. It was not the intent of Congress to afford to persons who desire to escape from their contracts technical and merely verbal grounds to excuse a breach of contract.

It should be remembered that contracts in usual form, containing no negative agreements, are means of establishing monopolies and suppressing competition quite as effective as contracts containing negative agreements. Whether the expression is positive or negative is largely a mere matter of form. The effective means of establishing a monopoly is to get contracts to purchase goods. This must precede any agreement restricting the sale of other goods. The restrictive agreements may or may not have an effect according to

the circumstances. Under some circumstances they may be an effective means for breaking a monopoly by instituting or maintaining competition. In the present case there is evidence that the largest competitor of the plaintiff is rapidly extending its business by affirmative contracts without restrictive conditions, and has a much more dominating position in the field than the present plaintiff. I can see no ground in the record for apprehension that anybody is likely to acquire a monopoly in the dress pattern business, in which, as the evidence shows, competition is very active.

I am unable to agree that this bill should be dismissed because the contract in question is unlawful under the Clayton Act. I concur in the result for the reason that I am of the opinion that the plaintiff, upon the filing of the bill, was not entitled to an injunction as a means of coercing the defendant to perform the principal contract to which the negative agreement was merely a subordinate and dependent provision, and for the reasons stated in our former opinion.

203 On May 2, 1918, this cause came on to be heard, and was fully heard by the court, Honorable Frederic Dodge and Honorable George H. Bingham, Circuit Judges, and Honorable Arthur L. Brown, District Judge, sitting.

Thereafter, to wit, on June 28, 1918, a per curiam opinion (page 171) was announced, and the following Decree was entered:

Decree.

June 28, 1918.

This case came on to be heard upon the transcript of record of the District Court of the United States for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now, to wit, June 28, 1918, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, reserving the right to the appellant to make application to that court under Equity Rule 22 to transfer its suit to the law side of that court; and the appellee recovers costs in this court.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on July 27, 1918, a petition for rehearing (page 175) was filed by the appellant, and on November 27, 1918, the following Order of Court was entered:

Order of Court.

November 27, 1918.

It is ordered that the petition for rehearing filed July 27, 1918, be, and the same hereby is, granted, and that the case be called for re-argument at the January session, 1919.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on January 28, 1919, this case came on to be heard on reargument before Honorable George H. Bingham and Honorable George W. Anderson, Circuit Judges, and Honorable Arthur L. Brown, District Judge, and was fully heard by the court.

204 Thereafter, on June 28, 1919, the opinion of the court (page 187) was announced, an opinion by Brown, J. (page 196), was filed and the following Final Decree was entered:

Final Decree.

June 28, 1919.

This case came on to be heard on reargument upon the transcript of record of the District Court of the United States for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now, to wit, June 28, 1919, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed with costs.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on July 14, 1919, the following Motion for Stay of Precept was filed by the appellant:

Motion for Stay of Precept.

[Filed July 14, 1919.]

The plaintiff being about to file a petition to the Supreme Court of the United States for a writ of certiorari moves that the issue of the mandate may be stayed.

By its Attorney,

ROBERT G. DODGE.

On the same day, to wit, July 14, 1919, the following Order of Court was entered:

Order of Court.

July 14, 1919.

Upon motion of the appellant setting forth that it proposes to file a petition in the Supreme Court for a writ of certiorari, it is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court,

ARTHUR I. CHARRON,
Clerk.

205 *Clerk's Certificate.*

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 204, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including July 21, 1919, in the cause in said court numbered and entitled, No. 1343, The Standard Fashion Company, Plaintiff, Appellant, v. Magrane Houston Company, Defendant, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-first day of July, A. D. 1919.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

206 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Standard Fashion Company is appellant, and Magrane Houston Company is appellee, No. 1343, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
207 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of November, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

208 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued "that the certified transcript of the record herein on file in the office of the clerk of the Supreme Court of the United States * * * may be taken as a return by this court to the writ of certiorari issued by the Supreme Court of the United States in the said case."

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this twenty-first day of November, A. D. 1919.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

[Endorsed:] 552/27,307. File No. 27,307. Supreme Court of the United States, No. 552, October Term, 1919. The Standard Fashion Company vs. Magrane-Houston Company. Writ of Certiorari.

209 United States Circuit Court of Appeals for the First Circuit.

No. 1343.

STANDARD FASHION COMPANY, Appellant,

v.

MAGRANE-HOUSTON COMPANY, Appellee.

Stipulation.

(Filed November 21, 1919.)

It is hereby agreed that the certified transcript of the record herein on file in the office of the clerk of the Supreme Court of the United States in the above case and there numbered 552 (October Term

1919) upon the docket of said court may be taken as a return by this court to the writ of certiorari issued by the Supreme Court of the United States in the said case.

ROBERT G. DODGE,
Attorney for the Appellant.
JAMES W. SULLIVAN,
Attorney for the Appellee.

A true copy.
Attest.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

210 [Endorsed:] File No. 27,307. Supreme Court U. S., October Term, 1919. Term No. 552. The Standard Fashion Company, Petitioner, vs. Magrane-Houston Company. Writ of certiorari and return. Filed Nov. 24, 1919.

Supreme Court of the United States

OCTOBER TERM, 1919

STANDARD FASHION COMPANY,

PETITIONER,

v.

MAGRANE–HOUSTON COMPANY,

RESPONDENT.

ETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1919

STANDARD FASHION COMPANY,
PETITIONER,

v.

MAGRANE-HOUSTON COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Standard Fashion Company, respectfully represents:

First. Your petitioner, a New York corporation engaged for the past 30 years in manufacturing and selling patterns for women's and children's garments and publishing periodicals and catalogues illustrating the clothing to be made from such patterns, brought a bill in equity on July 25, 1917, in the United States District Court for the District of Massachusetts against the respondent, a Massachusetts corporation conducting a retail dry goods store in the city of Boston, the jurisdic-

tion being dependent on diverse citizenship, to restrain it from violating the clause of its agency contract with the petitioner (which then had at least 19 months to run) by which it had agreed not to sell or permit to be sold on its premises during the term of the contract any other patterns than those made by the petitioner; and, the respondent having already broken the contract by ceasing to handle the petitioner's patterns and by undertaking to sell in place thereof patterns made by the McCall Company, a competitor of the petitioner, the bill contained a prayer for such damages as might be ascertainable. A copy of the material portion of the agency contract in question is hereto annexed marked "A."

Second. The respondent asserted the right to break the contract on the ground that the clause above referred to rendered the contract illegal and void under section 3 of the Clayton Act, and upon this ground alone sought to justify its conduct in terminating the sale of the petitioner's patterns before the end of the contract period and undertaking the sale of competing patterns.

Third. Section 3 of the Clayton Act (Act of Oct. 15, 1914, c. 323; 38 Stat. 731) is as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the district of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for

sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Fourth. The petitioner contended that if the contract between it and the respondent was to be treated as a contract of sale within the meaning of the foregoing section, it was valid because there was no evidence whatever that it might substantially lessen competition or that it tended to create a monopoly; and secondly, the petitioner contended that the contract was in substance one of agency (as was decided with reference to a similar contract in *Willcox & Gibbs Sewing Machine Co.* v. *Ewing,* 141 U. S. 627), and hence was not within the scope of this section.

Fifth. It appeared from the undisputed evidence that there are about 52,000 pattern agencies of this nature in the United States, distributed among the various companies which manufacture similar patterns; that the petitioner has about 6,000 agencies, and the Butterick Publishing Co. and the New Idea Co. the capital stock of which, together with that of the petitioner, has for many years been owned by a certain holding company, but which nevertheless transact business entirely independently of each other and without any contracts or arrangements between them, have between them about 14,000 agencies; that the McCall Company has some 12,000 and several other competing companies the remainder; that in all of the 52,000 contracts under which these agencies exist, except a few hundred, there is a clause by which the local dealer agrees not to handle other makes of patterns; that the petitioner's patterns are sold invariably as Standard patterns, either through local dealers or direct to the consuming public; that no other patterns are sold by that name; and that there is a valuable goodwill associated with the trade name or trade mark.

Sixth. It further appeared by uncontradicted evidence that the long-standing custom in the pattern business of restricting the local dealers maintaining agencies for the sale of patterns to one make of patterns grew out of the peculiar nature of the pattern business, which made it advantageous alike to the manufacturer, the local dealer and the public, agreements like that in question here having been sustained in many courts (*Butterick Publishing Co.* v. *Fisher,* 203 Mass. 122; *Standard Fashion Co.* v. *Siegel Cooper Co.,* 30 App. Div. 564; 157 N. Y. 60; 44 App. Div. 121; *Butterick Publishing Co.* v. *Rose,* 141 Wis. 533; *Peerless Pattern Co.* v. *Gauntlett Dry Goods Co.,* 171 Mich. 158; *Weiboldt* v. *Standard Fashion Co.,* 80 Ill. App. 67; *Sullivan* v. *Rime,* 35 S. Dak. 75).

That in the history of the business it has not tended to restrain competition or create a monopoly, but that on the contrary the number of pattern manufacturers has greatly increased under this custom and competition has grown more and more keen; that all of the various pattern manufacturers, except one, have agencies in the retail district of Boston within 750 feet of the respondent's store, the McCall Company which induced the respondent to break its contract with the petitioner now having three such agencies as against the petitioner's one.

No evidence was offered that this clause in pattern agency contracts has anywhere tended to suppress competition or to create a monopoly, or is likely to have such tendency in the future, or that any pattern company has ever had or is likely to have difficulty in securing suitable agencies either in Boston or anywhere else.

Seventh. There was no conflict in the testimony and the decision of the case by the courts below did not involve any question of fact depending on conflicting evi-

dence or on any peculiar circumstances existing in the case; there is involved merely the construction of section 3 of the Clayton Act and its application to undisputed facts.

Eighth. In the District Court Judge Johnson held that the contract was void on its face under section 3 of the Clayton Act, without any reference to the surrounding circumstances or the absence of any evidence tending to show a tendency on the part of the contract to restrain competition or create a monopoly. In effect the judge disregarded the last clause of the section, and his ruling, if correct, necessarily strikes down all the rest of the petitioner's 6,000 agency contracts as well as nearly all of the other 46,000 pattern agency contracts in this country, as well as a multitude of similar contracts in other branches of industry. The question is consequently one of great public interest.

Ninth. From the final decree entered on Mar. 13, 1918, the petitioner appealed to the Circuit Court of Appeals for the First Circuit. On June 28, 1918 that court announced its decision by a *per curiam* opinion, holding that the petitioner's remedy, if any, was on the law side of the court and declining to pass upon the validity of the contract under the Clayton Act. Thereafter a rehearing was granted upon the application of the petitioner and the case was again fully argued. On June 28, 1919, the court announced its decision, withdrawing entirely from the position taken by it in the earlier opinion, and affirming the decree of the District Court on the ground that the negative covenant violated the Clayton Act. On this question District Judge Brown dissented, expressing the opinion that full weight must be given to the final clause of section 3 of the Clayton Act, saying that this clause should be interpreted according to the principles stated in the opinion of Mr. Justice Brandeis

in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; that Congress evidently did not intend to "make a contract of this character void upon its face" or to bring about "an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect"; and that there was nothing whatever in the record in this case to justify a finding that the contract in question tended to suppress competition or create a monopoly.

Tenth. The decision of the court below runs counter to the practically uniform current of judicial authority with respect to the presumptive effect upon competition of contracts of this character, and is at variance with the decisions of other federal courts as to the effect of section 3 of the Clayton Act; and upon the question whether the contract is one of agency is in conflict with the decision of this court in the case referred to in paragraph Fourth hereof.

Eleventh. In deciding this case the majority of the court below relied on statements in the reports of the committees of the House and Senate which were not addressed to the Act as it passed Congress and thereby were misled as to the applicability of the Clayton Act to the contract here.

Twelfth. With respect to the right of the plaintiff to a decree if the covenant in question was not invalid under section 3 of the Clayton Act, the majority were in full accord with the plaintiff's position; the majority held that apart from the Clayton Act the contract was valid and the plaintiff entitled to relief; and the decision of the court below rested solely on the conclusion that the Clayton Act made the covenant invalid.

Thirteenth. Your petitioner is advised that the decision of the Circuit Court of Appeals is erroneous and your petitioner submits that the decision should be reviewed by this court for the following reasons:

1. Because the majority of the Circuit Court of Appeals, in declaring in effect that the negative covenant in this contract was invalid upon its face, in the absence of any evidence that it tended to lessen competition or to create a monopoly, completely disregarded the last clause of section 3 of the Clayton Act and misconstrued the section as a whole.

2. Because the effect of the decision of the majority of the Circuit Court of Appeals is to invalidate the 6,000 agency contracts of the petitioner and practically all of the 46,000 agency contracts of competing pattern manufacturers.

3. Because the existence of similar negative covenants in nearly all of the contracts of the petitioner's competitors prevents the clause of the petitioner's contracts from having any tendency toward monopoly or toward the substantial lessening of competition.

4. Because the majority of the Circuit Court of Appeals erroneously determined the contract in question to be a contract of sale within the meaning of section 3 of the Clayton Act, whereas it is in substance, as the petitioner contends, an agency contract not falling within the scope of this section of the Act.

5. Because the question of the effect of section 3 of the Clayton Act upon contracts of this nature, which are numbered in this country by tens of thousands, is one of very great public interest, upon which there is as yet no authoritative decision.

6. Because it is of the greatest public importance that uncertainty in the application of the Clayton Act to contracts of this kind should be ended.

7. Because the decision of the courts below in this case is in conflict with the decisions of other federal courts and with practically all the decisions of courts of last resort in the different states with respect to the pre-

sumptive effect upon competition of contracts of this nature.

8. Because in reaching said decision the court below relied on statements in the reports of the committees of the two houses of Congress which were not addressed to the Clayton Act as passed and thereby were misled as to its applicability to the contract in suit.

9. Because the decision of the court below did not involve questions of fact arising from conflicting evidence, but involved merely the erroneous conclusion that under section 3 of the Clayton Act the petitioner's contract with the respondent was invalid upon its face, regardless of the proven and uncontradicted fact that it had no tendency to substantially lessen competition or create a monopoly.

Wherefore your petitioner respectfully prays that a writ of certiorari may issue out of this court to the United States Circuit Court of Appeals for the First Circuit requiring the said case, in which your petitioner is plaintiff and plaintiff in error and the said Magrane-Houston Co. is defendant and defendant in error, to be certified to this court for its review and determination.

ROBERT G. DODGE,
Attorney for the Petitioner.

CHARLES E. HUGHES,
HERBERT NOBLE,
JAMES B. SHEEHAN,
ROBERT G. DODGE,
Of Counsel.

"A"

"Mutual agreement between the Standard Fashion Company of New York, first party, and Magrane-Houston Co., of Boston, State of Mass., second party.

First Party hereby grants to second party an Agency for the sale of Standard Patterns for Their store in the City of

Boston, State of Mass., for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided, and agrees to sell and deliver F.O.B. New York, or at its Branch Office in Boston, Mass., to second party Standard Patterns at a discount of Fifty Per Cent. from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party, at regular agents' rates; to allow second party to return discarded patterns semi-annually, between January 15th and February 15th, and July 15th and August 15th, in exchange, at nine-tenths cost, for other patterns to be shipped at the time of return or thereafter, but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct and must be delivered in good order to first party at its General Office in New York.

Second Party agrees, in consideration of the above, to purchase from first party, for free distribution, Standard Fashion Sheets to a number not less than seventy-five thousand (75,000) per annum, and Handy Catalogues to a number not less than Two thousand (2000) per annum; to pay transportation charges on all goods ordered or returned under this agreement; to purchase and keep on hand at all times, except during the periods of exchange specified above, One thousand ($1000) Dollars' value in Standard Patterns at net invoice prices, and to pay first party for a pattern stock of the amount stated above, to be selected by the first party, the terms of payment to be as follows: Dollars at time of signing this contract, and Five hundred ($500) Dollars in thirty days after shipment of stock, the balance of the purchase price Five hundred ($500) Dollars, to remain unpaid, as a Standing Credit, during the continuance of this agreement, and to become due and payable at its termination, second party to pay interest on this Standing Credit at the rate of three per cent. per annum on January 15th of each year; all other purchases to be paid for on or before the 15th day of the month succeeding the date of shipment.

Second party also agrees not to assign or transfer this agency, nor to remove it from its original location without the written consent of said first party, not to sell or permit to be sold on the premises of second party, during the term of this contract, any other make of patterns and not to sell Standard Patterns except at label prices. Second party further agrees to permit first party or its representative to take account of pattern stock whenever it desires, to pay proper attention to the sale of Standard Patterns, to conserve the best interests of the agency at all times, to re-order promptly all patterns as sold, and to give the department a prominent position on the ground floor in the store.

Either Party, desirous of terminating this agreement, must give the other party three months' notice in writing, within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months. Upon expiration of such notice, second party agrees to promptly return to first party all Standard Patterns, bought under this contract and then on hand, which first party agrees to credit on receipt in good order at three-fourths cost, paying to second party, within thirty days after receipt of same, in cash, any balance due. Neglect to return the pattern stock within two weeks after expiration of three months' notice shall relieve first party from all obligation to redeem the same. Failure to require compliance with the strict letter of this agreement shall not constitute a waiver of any condition nor forfeit nor prejudice any right hereunder.

It is hereby acknowledged by both parties that there are no verbal understandings between them conflicting with this contract.

Dated November 25th, 1914

STANDARD FASHION COMPANY

Done at Boston State of Mass. Per ROBERT KELLY

(*First Party*)

MAGRANE-HOUSTON COMPANY

P. B. MAGRANE, *Treas.*

(*Second Party*)"

Supreme Court of the United States

OCTOBER TERM, 1919

STANDARD FASHION COMPANY,
PETITIONER,

v.

MAGRANE-HOUSTON COMPANY,
RESPONDENT

BRIEF IN SUPPORT OF THE FOREGOING PETITION

INTRODUCTION

I

The Circuit Court of Appeals put its Decision entirely on the Ground that the Contract was invalid under section 3 of the Clayton Act

(*a*) The court agreed with the petitioner (hereinafter called the plaintiff) that at the time suit was commenced the contract had not been terminated.

The court says:

"The contract is dated November 25, 1914. Its first two-year term ran to November 25, 1916; failing the three months' notice within thirty days thereafter, the contract then ran until November 25, 1918. Then for thirty days there was another opportunity to give the three months' written notice of termination. . . . We think the negative covenant (assuming for the moment it and the rest of the

contract to be valid) is applicable to the entire life of the contract construed as to duration as we have indicated; that the contract shows a clear intention of the defendant to be bound for successive terms of two years, and for three months after notice of termination. We adopt, therefore, the construction put upon the contract by the court below. . . . The plaintiff consequently admits that its right to an injunction expired on February 25, 1919" (Transcript, pp. 188, 189).

The suit was commenced July 25, 1917.

(*b*) The court agreed with the plaintiff that it was entitled to an injunction when the suit was commenced unless the negative covenant was invalidated by section 3 of the Clayton Act.

The court says:

"Construing the contract as a whole, we do not think it can fairly be held so ambiguous as, if valid in all its provisions, to warrant the court in refusing the injunction prayed for" (p. 187).

(*c*) The court was of opinion that the expiration of the contract during the pendency of the suit did not deprive the court of jurisdiction to accord such relief as was proper.

The court says:

"The plaintiff insists, and rightly, that the gist of the case is whether the Clayton Act invalidates its contract in whole or any part, and that the fact that its right to an injunction has expired *pendente lite*, does not relieve the court from the duty of determining the issues admittedly alive and involving substantial rights at the time of the argument of the appeal in this court" (p. 190).

"But the plaintiff insists that the fact that relief by injunction has now become inappropriate by reason of lapse of time does not warrant the court in refusing to retain

jurisdiction in equity for the purpose of granting any appropriate relief, though it be only for the assessment of damages" (p. 189).

II

The Court made no Findings of Fact. The Case is not one where any Controversy of Fact is involved

(*a*) If the court will refer to the opinion, hardly a statement of fact can be found.

The court said:

"In effect the plaintiff admits that the only way of escape from the condemnation of the statute is for the court to hold that this negative covenant may not 'substantially lessen competition or tend to create a monopoly.' . . . It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern companies control approximately two fifths" (pp. 193, 194).

The court did not attempt to review the evidence but based its decision on pure conjectures and suppositions drawn from the face of the contract.

III

The Court reached the Conclusion as to the effect of the Clayton Act by a Misinterpretation of the Limitation found in the Proviso which makes invalid only those Contracts "where the Effect . . . may be to substantially lessen Competition or tend to create a Monopoly in any Line of Commerce"

The court said:

"The language is 'may be,' not 'is' or 'will be.' In order to condemn the negative covenant, it is not

necessary that the court should find that it *will* lessen competition or *will* tend to create a monopoly; it is enough to find that it *may* lessen competition or *may* tend to create a monopoly. . . . For present purposes, the fact that this section was amended in conference before final enactment we regard as of little or no significance. The reports of the two committees illuminate the evils and dangers in the trade situation with which Congress was undertaking to deal. As frequently happens, debate and conference modified the legislators' views as to the best method of dealing with the evils aimed at. But we find no abandonment of the main purpose expressed in these committee reports" (pp. 194, 192–193).

The House bill made every contract containing such a condition unlawful and provided for criminal punishment for making the same. The Senate rejected this and proposed to make only contracts of owners of patents containing such a condition invalid. The House refused to accede to the Senate bill and the bill went to conference. The conference rejected both the Senate and House bills and adopted the section in its present form with this proviso—"where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce"—and only in such case invalidated the contract.

The foregoing clearly demonstrates that there was a change in the purpose expressed in the committee reports and the court therefore in following the reports was misled as to the meaning and effect of the Act as finally passed.

The opinion of Brown, J., dissenting as to the construction of the Clayton Act, very properly says, "From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon

its face, and that the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect" (pp. 198–199).

ARGUMENT.

A. The Facts.

I

Preliminary Statement

The facts all appeared by undisputed testimony.

The plaintiff is a New York corporation engaged in the business of manufacturing and selling patterns and distributing periodical publications illustrating the garments to be made from such patterns (pp. 31–32). The patterns made by it have been sold since 1887 under the name of Standard Patterns throughout the United States and Canada and the name is a very valuable asset (p. 35). It sells its patterns direct to the consumer to a certain extent, but markets them in the main through about 6,000 local agents, like the respondent (hereinafter called the defendant), under contracts uniform as to form with that involved in this case. Dry goods stores where piece goods and fabrics of that kind are sold make the most desirable agencies (p. 33), and the defendant's store by reason of its location in the precise centre of the shopping district of Boston and its favorable reputation "as a great piece goods store" affords a peculiarly valuable location for an agency (p. 55).

The plaintiff's patterns have been sold in Boston for at least 28 years through different agencies (pp. 35–36).

The contract between the plaintiff and the defendant (Plaintiff's Exhibit 7, pp. 157–160) was entered into at the solicitation of the latter upon the expiration of a contract which the latter had had with the manufacturers of the Ladies' Home Journal patterns (pp. 37–38). The

plaintiff received no notice of termination from the defendant within thirty days after the expiration (on Nov. 25, 1916) of the first term of two years (p. 39), and consequently the contract was automatically extended for another term of two years and could not be lawfully terminated by either party until the expiration of three months after the end of such term, that is to say, until Feb. 25, 1919 (Opinion of Circuit Court of Appeals, p. 188).

The clause in the contract forbidding the defendant to handle other makes of patterns has been in the plaintiff's contracts for a great many years (p. 71) and in accordance with the general custom of the trade is found in nearly all the agency contracts of all the pattern manufacturers in the country (pp. 44, 56–57, 97).

On July 9, 1917, the defendant broke the contract by discontinuing altogether the sale of the plaintiff's patterns and the distribution of its advertising material and installing in its store in place thereof the patterns and advertising material of the McCall Company, one of the plaintiff's competitors (p. 41; Opinion of Judge Johnson, p. 12). It appeared that several months before, to wit, on Feb. 2, 1917, the defendant had, without the plaintiff's knowledge, made a contract with the McCall Company whereby it was to become at an early date "special agent" at Boston for the sale of McCall patterns (Plaintiff's Exhibit 17, pp. 165–168).

At the time of the breach of contract the plaintiff had but one other agency in the retail district of Boston. That agency was in the store of R. H. White Co. and the contract with that company, entered into on Feb. 7, 1917 (p. 69), contained an agreement on the part of the plaintiff that it would not maintain any other agency within a quarter of a mile of the White store except that in the defendant's store (pp. 50, 95).

Having no adequate remedy at law because of the obvious impossibility of ascertaining the full amount of its damages, the plaintiff brought this bill in equity, relying on *Butterick Publishing Co.* v. *Fisher,* 203 Mass. 122, and similar cases, hereinafter cited. The defendant offered no justification in fact for its breach of contract, and merely claimed that section 3 of the Clayton Act invalidated the agreement.

The purpose of the suit was to maintain the plaintiff's right to continue to transact business in the same manner as it had done for many years.

II

The Complete Absence of Evidence that this Contract or this Form of Contract has tended to lessen Competition or to create a Monopoly or might have such Tendency

The principal pattern manufacturing companies conducting a business similar to that of the plaintiff are the McCall Co., the New Idea Co., the Pictorial Co., the Butterick Publishing Co., the Home Co., the Peerless Co. and the May Manton Co. All of these concerns except the May Manton Co. market their products through local agencies in substantially the same way as does the plaintiff (p. 43). By the general custom of the trade substantially all pattern agency contracts contain a clause like that in the contract between the plaintiff and the defendant, to the effect that the agent shall not handle the patterns of any other maker (pp. 44, 56–57, 97). This custom has recently been given up by the McCall Co., whose new form of contract eliminates most of the agency features of the plaintiff's contract, but of the 12,000 agencies of that Company all but 300 to 400 are still act-

ing under the old form of contract, which contains the clause in question (pp. 137–140). The representative of the McCall Co. who testified for the defendant could name no other company which has eliminated this clause from its contract (p. 140). There was undisputed evidence that very few stores in the country have handled two kinds of patterns at the same time (pp. 97–98).

No attempt was made by the defendant to show by evidence that the effect of the contract either had been in the past or might be in the future "to substantially lessen competition or tend to create a monopoly," either in Boston or anywhere else.

On the contrary it appeared without contradiction that competition in the pattern business has grown continually more and more severe, that new pattern companies have been organized and have acquired a large trade, and that there are to-day many more companies in existence and doing a larger business than was the case 20 or 30 years ago. When the plaintiff began business in Boston some 28 years ago, the only other companies in the business were the Butterick Co., the Demarest Co. and the Imperial Co. (pp. 50–51). The McCall Co. and the other large companies above referred to have been organized and started business since that time and several of them within recent years (pp. 53–55).

The plaintiff has about 6,000 agencies in the United States, and, in round numbers, the Butterick has 10,000, the McCall Co. 12,000, the New Idea Co. 4,000, the Home Co. 5,000 to 6,000 and the Pictorial Co. 6,000 to 8,000. In all there are about 52,000 pattern agencies in the United States (pp. 53–55, 131).

There was no evidence that any of the other pattern companies have ever had difficulty in establishing proper agencies in Boston. All of them except the Peerless Co.

have at least one agency in the retail district of Boston within 750 feet of the defendant's store (pp. 51, 112). The McCall Co., for example, already had three other agencies in that territory before it succeeded in establishing another with the defendant by inducing it to break its contract with the plaintiff (pp. 51, 111). At the time of the breach of the contract the plaintiff had only one other agency in the retail dry goods section of Boston (p. 52).

Instead of making monopolistic profits, the evidence showed that the plaintiff made no money at all during the last year before the trial of this case (p. 85).

Mr. Scanlon, the president of the plaintiff Company, testified without contradiction that it is not advisable and has not been the custom for a pattern company to seek a very large number of agencies in a small city or in any particular section of a large city, and he explained the reason why (p. 53). It is obvious that the obligation to take back unsold patterns sets a limit to the number of agencies which any manufacturer can profitably establish in a given locality (pp. 45–46).

The actual conditions existing at the time of the defendant's breach of its contract with the plaintiff showed the futility of the contention that the contract with the defendant tended to monopoly. The available stores in the retail district were divided among the various competing companies, each store handling patterns of one manufacturer only, under agency contracts, and there was no evidence that any pattern company was having any difficulty in marketing its product or that its business was not effectively handled by its local representative (pp. 55, 57, 100). The plaintiff itself had definitely agreed with the R. H. White Co., with which under a contract made in February, 1917, it had established its other

agency in Boston, that it would not maintain any further agency within a quarter of a mile of the White store except the one with the defendant, and the territory thus described includes the entire dry goods district of the city (pp. 50, 95). The proprietors of all the other available stores had existing contracts with other pattern companies (pp. 55, 57, 100). Hence at that time as a matter of fact the clause in question in the defendant's contract cannot have had any tendency whatever toward the lessening of competition or the establishing of a monopoly in the pattern business in Boston.

The complete absence of any evidence indicating that the contract in question tended to lessen competition or create a monopoly was the principal reason for Judge Brown's dissent from the opinion of the majority of the court on the question of the Clayton Act, and for his conclusion that the decision gives no effect to the last clause of section 3 (pp. 196 *et seq.*).

The one piece of evidence relied on by Judge Johnson in the District Court and by Judge Anderson in the Circuit Court of Appeals as tending to show a monopolistic tendency on the part of this contract, is the admitted fact that the plaintiff Company is controlled by a certain holding company which also owns the stock of the Butterick Publishing Co. and the New Idea Co. and that the three companies between them have 20,000 agencies out of a total of 52,000 in the United States. It appeared, however, that the officers of the three companies are different and that they are managed entirely as distinct concerns without any agreements among them (pp. 103–4, 131–2). There was no evidence that competition had been destroyed or lessened as between these three companies or that they had parcelled out the territory among themselves or had in any way sought to restrain trade or cre-

ate a monopoly. Nothing whatever appeared except that they had common stockholders. Furthermore, the relation between the three companies has existed for a great many years (p. 132), and there was no evidence whatever as to the number of agencies which the three companies had at the beginning of the period, or whether the number as compared with those of the other companies had increased or diminished during the period, or that the situation had been in the slightest degree affected by the exclusive feature of the agency contracts. On the contrary, the record shows that since the plaintiff commenced business every one of the 32,000 agencies of the companies other than these three had been established. During all of its 30 years of existence the plaintiff had succeeded in establishing but 6,000 agencies. The suggestion that its contracts tend to monopoly is made by the defendant in the interest of its new contract with the McCall Co., a concern which has come into being and has established some 12,000 agencies in spite of the restrictive covenant in the contracts which the plaintiff has in the meanwhile been making with its much smaller number of agents.

In the face of the experience of 30 years it is absurd to claim that the plaintiff's contracts with its local dealers tended to lessen competition or to create a monopoly or that there is any likelihood of their having such tendency in the future.

It is indeed manifest that the very fact that the exclusive covenant exists in nearly all of the 46,000 agency contracts of the plaintiff's competitors, which is in accordance with the almost universal custom of the pattern trade, has prevented and must continue to prevent the acquisition of any monopoly by the plaintiff or any other company.

III

The Reason for the Custom of Restricting Local Dealers to one make of Patterns and its Advantages

The plaintiff sells its patterns direct to the public to a considerable extent, partly at its sales rooms and partly by a very considerable mail order business. In the sales thus made direct to the public, the plaintiff does not undertake to impose any condition whatever on the purchasers (p. 48).

The custom of pattern manufacturers to stipulate with the local dealers handling their product that the latter should not sell during the term of the contract with one manufacturer, any other make of patterns, grew out of the peculiarities of the pattern business. Upon this point the plaintiff's president testified at the trial, and no attempt was made to contradict his testimony.

Patterns are a very perishable article. They are made in a great variety of styles of which a considerable proportion changes very quickly. Of those made by the plaintiff some 1200 different styles are current at the same time and about 60 new styles are produced each month. Each style is cut in different sizes, the number of which on the average is seven. Each local dealer should carry at least two sizes of nearly all the styles (pp. 34–35). It follows that a large stock of one make of patterns necessarily occupies a given space and that dealers, having only a limited space which can be devoted to patterns, would have to devote substantially double the space to two makes of patterns that is required to handle one, since the supply cannot be restricted to one-half as many of each make as would naturally be carried of one make

alone, without rendering the stock altogether inadequate as to each kind (p. 46).

The testimony showed that the custom of the pattern business by which local dealers or agents are restricted to one kind of patterns has subserved the interests not only of the parties to the contracts, but of the public as well. The plaintiff's president testified at some length upon this point (pp. 45–48) and he was not contradicted. The defendant called as one of its witnesses an expert (Rotheroe) in the employ of the McCall Co., the beneficiary of the defendant's breach of contract in this case, and if the facts were not as stated by Mr. Scanlon, it is fair to assume that testimony in contradiction would have been elicited from this witness. As has been said, patterns are not articles of which the retailer may advantageously carry two stocks, as each stock must contain substantially all of the very numerous styles and the carrying of two kinds of patterns results in practically doubling the retailer's expense with reference to patterns without increasing his sales. If the agencies are not exclusive in the sense referred to, the manufacturer must stand the additional cost incident to the necessary maintenance of more agencies and the obligation to take back more unsold patterns. The result of these conditions is that the public must pay the higher prices necessary to cover the increased expense of manufacturer and dealer.

For example, in the ordinary town of 10,000 inhabitants there are 5 or 6 stores each of which handles a different kind of pattern. The evidence shows that the total amount of pattern business would not be increased if each of these 5 or 6 stores handled all the patterns made, but on the contrary there would be an enormous waste to the manufacturer and to the local dealers and a substantial increase in cost to the consumer, who must

necessarily in the end pay the increased expense of transacting the business (pp. 45–46).

There was no evidence that anybody would benefit by the elimination of the exclusive feature from pattern agency contracts, or that its presence has worked hardship to anyone in the past.

IV

The Nature of the Contract now before the Court

The contract admittedly has some of the elements of sale, but the agency features so predominate as to determine the real nature of the contract. It establishes, as its language reads, "an Agency for the sale of Standard Patterns" (p. 158). *Its object is not to sell patterns to the local dealer, but to sell them through the local dealer to the public.* If they are not so sold the dealer *must* return them and the manufacturer *must* take them back at the expiration of the contract. While the dealer gets an interest in the patterns, he does not get full title. The only use which he can make of the patterns is to sell them to the public or return them to the plaintiff. His rights are strictly limited also as to duration, for they cannot extend beyond the termination of the contract period. If the patterns have not then been sold they must be at once returned and his interest in them ceases. He is not a mere vendee but is an agent bound to promote the plaintiff's interests in various ways. His duties to the plaintiff are by no means fulfilled upon payment of the price stipulated to be paid for the patterns.

That the contract in the present case is in substance one of agency is plain from a consideration of its provisions. While it is true, that with the limitations above described the agent "purchases" the patterns, the plain-

tiff nevertheless retains an interest in them so long as they remain unsold in the possession of the agent. It is obliged to take back during two periods of each year, at 90 per cent. of the cost, such of them as are discarded, and to take back at the expiration of the contract, at 75 per cent. of the cost, all that remain unsold, and the agent agrees unconditionally to return all that are unsold. By virtue of these provisions the ultimate financial result to the parties cannot be determined until the termination of the relationship and the ascertainment of the value of the patterns remaining on hand, and throughout the entire contract period the two parties are mutually interested in what is really a joint commercial enterprise. The relationship between them is obviously entirely different from that ordinarily existing between vendor and vendee.

The interest of the manufacturer in the development of the business, and particularly in having its patterns sold through the agent to the public, is safeguarded by the various provisions of the contract by which the agent obligates himself to promote the manufacturer's interests. Thus the agent agrees to buy a quantity of fashion sheets and handy catalogues annually for free distribution, to keep the pattern stock up to a certain minimum at all times, to "pay proper attention to the sale of Standard patterns" and "conserve the best interests of the agency at all times" and "re-order promptly all patterns as sold"; and he further agrees to "give the department a prominent position on the ground floor of the store" and not remove the agency "from its original location without the written consent of the manufacturer"; and to permit the manufacturer to "take account of the pattern stock whenever it desires"; and he agrees to return promptly at the expiration of the contract all patterns remaining unsold. Fifty per cent. of the purchase price

of the original stock of patterns shipped to the agent remains unpaid as a "standing credit" throughout the period of the contract, and at the end of the period is not liquidated in cash, but by the return of the patterns remaining on hand. These features of the contract differentiate it from one of sale and give it the distinguishing characteristics of an agency contract.

In the case at bar the defendant itself treated the contract as constituting an agency and not a sale, for when it wrongfully undertook to terminate the contract, it returned all the unsold patterns to the plaintiff (p. 68).

The Statute

Section 3 of the Clayton Act (Act of Oct. 15, 1914, c. 323; 38 Stat. 731) is as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

B. The Law.

I

The Reasons for asking this Court to review the Case

It is submitted that there is unusual justification for the submission in this case of a petition for a writ of certiorari.

The effect of the decision below is to strike down, as being illegal upon their face, practically all of the 52,000 pattern agency contracts in this country as well as thousands of similar contracts in other lines of business.

This court is not asked to reverse decisions below on questions of fact arising upon conflicting evidence, for there were no such questions. The facts were not in dispute. The sole question was whether they showed that this contract fell within the prohibitions of section 3 of the Clayton Act, or whether on the other hand no violation of that section was shown. Assuming the contract to be one of sale, the question now is in its essence simply this: Is the last clause of the Clayton Act to be given any effect, or are contracts containing a restrictive clause of the sort described to be condemned upon their face without reference to the surrounding circumstances?

The decisions of the courts below, if allowed to stand, will lead to litigation everywhere. The division of opinion in the Court of Appeals, the failure of the majority to give any effect to the last clause of the section, and their decision that in spite of *Willcox & Gibbs Sewing Machine Co.* v. *Ewing,* 141 U. S. 627, the contract is one of sale to which the statute is applicable rather than a contract of agency to which it is not applicable, will prevent the decision from being accepted as final anywhere.

Furthermore, the majority of the Court of Appeals, in attributing to this contract the presumptive effect of substantially lessening competition within the meaning of the statute, has departed from the views expressed almost universally by other courts both state and Federal with reference to the effect upon competition of contracts of this character and their *prima facie* legality.

The great importance to the business world and to the profession of an authoritative decision with reference to contracts such as this, coupled with the difference of opinion exhibited in the court below and the apparent conflict between the decision of the majority and the hitherto prevailing judicial opinion, justifies, it is submitted, a request to this court to review the case.

II

There was no Evidence that the Contract tended to substantially lessen Competition or to create a Monopoly within the Meaning of the Clayton Act

In the complete absence of evidence showing that the contract in question had or might have any substantial effect upon competition, the decision of Judge Johnson in the District Court and that of the majority of the Circuit Court of Appeals amounted to a ruling that the contract was illegal upon its face.

As Judge Brown pointed out in his opinion dissenting from the majority view (p. 200):

> "The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden

> is upon him who asserts illegality. The application of the statute should be made only upon full proofs. The consequences of applying it otherwise are too serious to be disregarded."

The majority opinion on the other hand erroneously states the question as if the burden were on the plaintiff to prove that the contract might not restrain competition:

> "The plaintiff admits that the only way of escape from the condemnation of the statute is for the court to hold that this negative covenant may not 'substantially lessen competition or tend to create a monopoly.' No such finding can be made" (p. 193).

The plaintiff made no such admission. In the first place it contends now, and has contended at every stage of this case, that the contract is one of agency to which the statute has no application. This point is discussed later. If the contract is to be treated as one of sale within the meaning of the statute, the plaintiff denies that the burden of proof rests on it to establish its legality, but maintains that the question before the court was whether the evidence justified an affirmative finding that the particular contract in question, under all the actual conditions existing at the time, tended to the suppression of competition or the creation of a monopoly within the meaning of the statute.

Full weight must, as Judge Brown says (p. 196), be given to the final clause of section 3 of the Act:

> "From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon its face, and that the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemna-

tion of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect, and in recognition of the fact that where there is an established monopoly competition cannot be instituted or maintained unless the new competitor in the field can make a contract with someone to handle only its own goods and not to handle the goods of a company already dominating the field; that if such contracts were to be condemned irrespective of the trade in which they were made this might lead to effective suppression of competition, by enabling an established monopoly to place its goods in the shop of every competitor" (pp. 198–199).

In the Clayton Bill as originally reported to the House of Representatives (63d Congress, 2d Session, Report No. 627; Plaintiff's Exhibit 15) the subject matter of the present section 3 was contained in section 4, which read as follows:

SEC. 4. "That any person engaged in commerce who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court."

This section was passed by the House as reported (H. R. 15657). It was thereafter reported to the Senate (63d

Congress, 2d Session, Report No. 698; Plaintiff's Exhibit 16) in the following form:

> SEC. 4. "That it shall be unlawful for any person engaged in commerce to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities whether patented or unpatented for use, consumption, or resale within the United States, or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller."

The language from the House and Senate reports, quoted by Judge Anderson in his opinion (pp. 191–192) relates exclusively to the bill as reported containing these drafts of section 4, which made all contracts of the kind referred to invalid whatever their effect might be.

The Senate rejected section 4 as reported and passed the bill with the following section substituted:

> "That it shall not be lawful to insert a condition in any contract relating to the sale or lease of or license to use any article or process protected by a patent or patents, the effect of which will be to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor, or his nominees, or the effect of which will be to require the purchaser, lessee, or licensee to acquire from the seller, lessor or licensor, or his nominees any article or class of articles not protected by the patent; and any such condition shall be null and void as being in restraint

of trade and contrary to public policy. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both, in the discretion of the court" (Congressional Record, pp. 15, 574–577).

The House of Representatives disagreed with the Senate amendments and the bill went to conference as a result of which the Act in its present form was evolved, agreed to and became law.

It will be observed that the change made by the conference committee, in framing section 3, with the limitation contained in the last clause thereof, is of great significance, and not as the majority said, "of little or no significance" (p. 193), for the reports relied upon by the majority dealt with provisions which did not contain such a limitation.

The history of the legislation shows, as Judge Brown says, that Congress intended by the final clause of the section "to prevent the disturbance that might result to long-established methods of business by an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect."

The only facts appearing in evidence which could be claimed to bear in any way upon the question of monopoly, were the facts concerning the ownership by the holding company of the shares of stock of the plaintiff, the Butterick Publishing Co. and the New Idea Co., and the fact that the three companies together have about 20,000 agents in United States out of a total of 52,000 pattern agencies (p. 131). But as has been pointed out, there was no evidence that this relationship between the

companies, which has existed for nearly twenty years (p. 132), had restrained competition even as between themselves. On the contrary, it appeared that the business of the three companies has been and is carried on entirely separately and that there are no agreements between them (p. 104). There was no evidence that the ownership of the stock by the holding company has resulted, either with or without the aid of these exclusive agency contracts, in any suppression of competition or tended to create a monopoly, or that there *might* be any such result or tendency. On the contrary, it appeared that various new competing companies have been organized during this period and have acquired a large share of the business, that competition has grown more and more severe, and that the McCall Co. which induced the defendant to break its contract with the plaintiff is the largest company of all (pp. 51–55). In fact, as against the 20,000 agencies of the plaintiff and the Butterick Publishing Co. and the New Idea Co. the other competing companies have succeeded in securing 32,000. Legitimate business reasons for the existence of the exclusive clause in agency contracts are to be found in the nature of the patterns and the pattern business and were shown by evidence not contradicted. Yet Judge Johnson and the majority of the Court of Appeals struck down this particular contract, not by reference to any evidence of an illegal tendency, for there was none, but merely because of the holding company and speculative theories as to what might happen if certain imagined conditions should arise.

The grounds of Judge Johnson's decision were thus stated by him (pp. 20–21):

> "The contract must be considered as part of a widely extended system and a conclusion reached as to the legality of the system. There are in the United States and Canada

about fifty-two thousand (52,000) so-called pattern agencies, and of these the plaintiff and two other companies allied with it through a common holding company control about twenty thousand (20,000) with all of whom a contract like the one we are considering is in force.

The contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers: a large retail dry goods store at the corner of Temple Place and Washington Street, in the centre of the dry goods district of a large city.

. . . . . .

If the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry goods stores in this district, it would have a complete monopoly of the sale of patterns in it, and there is nothing in the contract to prevent it doing this, or even covering the whole State of Massachusetts or the whole country. If there were but one dry goods store in a village and the plaintiff could make this contract with the proprietor of that store, it would secure a practical monopoly of the pattern business in that village."

It thus appears that the decision is really based on the fact that by this contract the plaintiff established a monopoly in the defendant's store and that a complete monopoly would result *if* the plaintiff could make similar contract with all other stores.

To the same effect is the conclusion stated by the majority of the Circuit Court of Appeals as follows (p. 194):

"On this record we are constrained to find that this restriction may substantially lessen competition and may tend to create a monopoly. It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern companies control approximately two-fifths. The restric-

tion of each merchant to one pattern manufacturer must in hundreds, perhaps thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.

We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances, we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition or may tend to create a monopoly,—or both,—and is therefore obnoxious to the Clayton Act."

It does not appear what "facts peculiar to the business" were in the minds of the court, nor what is meant by "conditions already achieved under such restraint." Nothing appeared in evidence with reference to the character of the business except the facts above referred to (pp. 23–25, *supra*), which have made it of advantage to manufacturer, dealer and public that the dealer should handle only one make of patterns and which have led to the almost universal custom of the business by which the dealer is so limited. As to the "conditions already achieved under such restraint," there was no evidence whatever, as has been pointed out, that this method of doing business has had any effect in lessening competition or preventing new companies from entering into the field or that it has caused any pattern company to

have difficulty either in Boston or anywhere else in establishing a proper agency. All of the other pattern companies except the Butterick Publishing Co. have begun business since the plaintiff, and have established their thousands of agencies in the face of the plaintiff's exclusive contracts.

The suggestion in the majority opinion (p. 194) that there must be hundreds, perhaps thousands, of small communities in which such an absolute monopoly might be effected is purely fanciful, as it did not appear in the testimony that any pattern company has ever established or could possibly afford to establish an agency in any community so small as to have only one store. As there are, according to the census of 1910, over 132,000 cities, towns and villages in the United States, it is obvious that not many of the plaintiff's 6,000 agencies are likely to be located in villages of only one store. It must be borne in mind, too, that in this case the question is not as to the validity of a contract with a dealer in a small town or of any other hypothetical agency contract that might be made, *but as to the validity of this particular contract between the plaintiff and the defendant under the actual conditions existing in Boston and in the trade.*

It is to be noted that the contract in question does not restrain the defendant from selling other kinds of patterns *anywhere,* but merely prevents its selling them at its store in Boston. It may well have another store or stores in other cities and if so it is free to sell other patterns there. In other words, there is no agreement on the part of the defendant that it will not "deal in the goods . . . of a competitor or competitors" of the plaintiff, as prohibited by the Act, but merely an agreement not to sell them in this particular store.

If it were a fact that the plaintiff had a contract with the only merchant in a community, with this negative

covenant in it, and therefore a monopoly of the pattern business in that community, such fact would have no relevancy or bearing on the question as to whether this particular contract in Boston substantially lessened competition or tended to create a monopoly.

It is submitted that Judge Johnson and the majority of the Court of Appeals did not proceed in accordance with the principles stated by Mr. Justice Brandeis in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238:

> "The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

In the present case the courts below did not consider at all the uncontroverted facts revealed by the history

of the business, with respect to the growth of new companies, the increase of competition and the absence of monopolistic profits under the régime of contracts like this; nor did they consider the reasons furnished by the nature of the business for the conclusion that these contracts are advantageous to all parties, including the public, and that self interest will preclude a manufacturer from seeking to monopolize the possible agents in a given locality. No consideration whatever was given to the actual conditions existing in Boston at the time of the making of this particular contract or at the time of its breach. Those conditions were such that obviously the contract between the plaintiff and the defendant *cannot* have had any effect upon competition. When the defendant broke its contract, the plaintiff had one other agency contract in Boston, that with the R. H. White Co., in which it had agreed that it would not establish any other agency within a quarter of a mile of the White store, except that with the defendant (pp. 50–95). The territory thus delimited covers the "shopping district" of Boston (p. 50), and includes "everybody that competed in the trade" (p. 95). Wholly apart from this, any effort on the part of the plaintiff to take steps in the direction of monopolizing trade in Boston would have been met at the outset with the obstacle that all the other available stores had existing contracts with other pattern companies (pp. 55, 57, 100).

The evidence shows that twelve pattern companies had agencies in Boston and its suburbs and that all the principal companies, except the Peerless, had one or more agencies in prominent stores in the retail district of Boston (pp. 113–115). There is no evidence whatever that any pattern manufacturer has ever had difficulty in establishing a proper agency in Boston, or, indeed, anywhere in the country, or that as a matter of fact there has *anywhere*

been any lessening of competition or monopolization of the business.

The question presented upon this record is whether, because of the use of the word "may" in the last clause of section 3, Congress intended the courts to strike down any contract which might, in some imagined state of affairs, tend to monopoly, without any evidence that that state of affairs had ever existed or was likely to arise and without any consideration of the nature of the business, the purpose of the particular contract, its effect in the past and the reasonable probabilities as to its effect in the future.

Judge Brown in his dissenting opinion answers this question in the negative. It is submitted that the views expressed by him are sound:

> "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of 'possibility' arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a 'dangerous probability.'
>
> In the present case there is no evidence that any competitor of the plaintiff had ever been excluded from competition in the city of Boston or elsewhere because of inability to procure customers or a store in which he might market his goods. If the defendant desired to defend upon the ground that this contract, by reason of its effect upon the trade, was illegal, it was incumbent upon it to allege and prove such facts as would enable the court to make a reasonable prediction of consequences. . . I am of the opinion that this court should not upon this record and upon so incomplete a state of proofs determine the invalidity of this contract. . . . I can see no ground in the record for apprehension that anybody is likely to acquire a monopoly in the dress pattern business, in which, as the evidence shows, competition is very active" (pp. 198, 199, 201).

III

The Decisions of the Courts below give an Effect to Section 3 of the Clayton Act which in view of the State of the Law at the Time of its Passage Congress cannot have intended

Before the passage of the Clayton Act contracts of this character were frequently assailed as being in restraint of trade, either at common law or under the Sherman Act or state anti-monopoly statutes, and the view taken by the courts with practical unanimity was that they did not restrain trade. Congress knew that this had been the generally accepted judicial opinion, and consequently there was an effort originally to enact legislation that would have made all such contracts illegal on their face. By adding the last clause of the section Congress declared that the contracts should not be bad on their face, but should be condemned only if they had a tendency toward substantial restraint of competition or monopoly. Decisions prior to the statute that *prima facie* no such effect is to be attributed to such contracts are clearly persuasive as showing that in cases under the Act there must be some substantial affirmative evidence to justify condemnation of any particular contract.

In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, the court had under consideration a so-called profit-sharing scheme of the Corn Products Co. by which the Company agreed to give to its customers a stipulated percentage upon the amount of the purchases made in one year, to be paid at the end of the following year provided that during such time they made all their purchases of glucose and grape sugar from the Company. The alleged illegality of a contract to this effect which

the Corn Products Co. had made with the defendant was set up by the latter in defense of an action by the Corn Products Co. to recover the price of certain glucose sold the defendant. It appeared that the Corn Products Co. was a combination composed of all the manufacturers of glucose in the United States. In delivering the unanimous opinion of the court Chief Justice White said (pp. 172–173):

> "The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and a clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

In *Cole Motor Car Co.* v. *Hurst,* 228 Fed. 280, 284 (C. C. A. 5th Circ.), the court held that a contract between a manufacturer of motor cars and a dealer was valid under the Sherman Act and under the anti-trust law of Texas, saying:

> "He [the dealer] was given the privilege of selling in certain counties, and no others, and he was restricted from selling the cars of other motor car companies in the same counties; but this method is an ordinary instrumentality by which manufacturers and others display and dispose of their goods and commodities, and make sure of payment, if they can. It is not restrictive of trade in any sense. Insurance companies, and many other occupations and trades, parcel out their territory to different agents, and make similar arrangements. That it could not defeat competition is obvious to the court. There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the per-

> fectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements . . . There surely then has been no restraint of this trade."

When the case came before the court a second time Batts, Circuit Judge, who had not participated in the former decision said (at p. 832):

> "The part [of the contract] which was claimed to be obnoxious to the Texas law appears to be a reasonable provision, almost essential to efficient marketing of the company's products."

Tillar v. *Cole Motor Car Co.*, 246 Fed. 831, 832.

See *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454 (C. C. A. 8th Circ.).
In re Green, 52 Fed. 104 (C. C. S. D. Ohio).

The validity, at least prior to the Clayton Act, of pattern agency contracts in substance identical with that involved in this case cannot be questioned. State courts of the highest repute have not hesitated to sanction the issue of injunctions restraining the local agent or dealer from selling the patterns of other manufacturers than the one to whom he was bound by contract.

Butterick Publishing Co. v. *Fisher*, 203 Mass. 122.
Standard Fashion Co. v. *Siegel Cooper Co.*, 30 App. Div. 564; 157 N. Y. 60; 44 App. Div. 121.
Butterick Publishing Co. v. *Rose*, 141 Wis. 533.
Peerless Pattern Co. v. *Gauntlett Dry Goods Co.*, 171 Mich. 158.

The validity of contracts of this character is shown by many other decisions collected in Davies' Trust Laws and Unfair Competition, pp. 410 *et seq.*

See *Brown* v. *Rounsavell*, 78 Ill. 589.
Southern Fire Brick & Clay Co. v. *Garden City Sand Co.*, 223 Ill. 616.
Ferris v. *American Brewing Co.*, 155 Ind. 539.
J. W. Ripy & Co. v. *Art Wall Paper Mills*, 41 Okla. 20.

In the case last cited the court said (at p. 23):

> "An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade.
>
> A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it, will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce."

That pattern agency contracts like that in the case at bar have not been regarded by the courts as being *prima facie* in restraint of trade or competition is shown by the fact that they have been sustained many times as against attacks based on the anti-monopoly statutes of different States, some of which are most sweeping in their condemnation of any agreement tending toward monopoly.

Thus in *Butterick Publishing Co.* v. *Fisher*, 203 Mass. 122, it was held that the contract of the Butterick Company, which was substantially identical with the con-

tract of the Standard Fashion Co. now before the court, was not illegal under the provisions of R. L., c. 56, s. 1, which is as follows:

> "A person, firm, corporation or association of persons, doing business in this Commonwealth, shall not make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation or association of persons; but the provisions of this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of goods, wares or merchandise."

Pattern agency contracts have uniformly been sustained by the New York courts, notwithstanding the provisions of Laws of 1899, c. 690, s. 1, to the effect that:

> "Every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented is hereby declared to be against public policy, illegal and void."

With reference to the similar New York statute of earlier date (Laws of 1893, c. 716), Judge Ingraham, speaking for the court in *Walsh* v. *Dwight*, 40 App. Div. 513, said (at p. 517):

> "This Act did not have the effect of preventing a manufacturer from fixing the price at which his articles should

be sold, or from making an agreement with those persons who acted as the jobbers or retailers of his manufactured articles that they would deal exclusively in his merchandise, or would not sell the merchandise of other persons at a less price than that for which his product was sold."

In *Peerless Pattern Co.* v. *Gauntlett Dry Goods Co.*, 171 Mich. 158, a case like the present, the contract was held not to violate the provisions of Act No. 329 of the Public Acts of 1905, the first two sections of which read as follows:

SECT. 1. "All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."

SECT. 2. "All combinations of persons, co-partnerships or corporations made and entered into for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession or business, are hereby declared to be against public policy and illegal and void."

In *Weiboldt* v. *Standard Fashion Co.*, 80 Ill. App. 67, it was held that a pattern agency contract of the Standard Fashion Co. precisely identical in the provision under consideration with the contract in the case at bar was not void as being in restraint of trade, either at common law or under the state statute relating to trusts and combinations, which makes unlawful any agreement to regulate or fix the price of any commodity or to fix or limit the amount or quantity to be sold in the State. (See Ill. Rev. Stats., sec. 269*a*.)

In *Sullivan* v. *Rime*, 35 S. Dak. 75, an action was brought to recover the price of patterns sold by plain-

tiff's assignor (the Home Pattern Co.) to the defendants under an agency contract by which the defendants purchased the patterns and agreed not to offer for sale any other make of patterns. The case came up on demurrer and it was held that the demurrer was properly overruled. The court said (at p. 77):

> "The contention of appellants is that said contract, by reason of the provisions therein contained that defendants should not offer for sale any other make of patterns, is void and contrary to the provisions of c. 224, Laws of 1909, prohibiting monopolies. . . . There may be some serious question, considering the provisions of said contract as a whole, whether it is in fact an agency or a sales contract. But, as we view the case, it is not material to a determination whether it be held an agency or sales contract, as the result would be the same in either case. We are of the view that the provisions of said c. 224 have no application and were never intended to cover or include any of the questions here presented. The Home Pattern Company had the right to sell and to have sold its merchandise in this state, and had the right to procure an agent or purchaser to deal in and handle its patterns, obligated and bound by contract not to offer for sale or sell other like patterns for other parties. Whether treated as an agency or sales contract, there is nothing therein which, in the slightest degree, tends to the creation of a monopoly, or which in any manner tends to interfere with the right of any other persons to offer for sale or sell like merchandise of other makes in direct competition with the sales under the contract in question. So far as any provision of this contract is concerned, the whole world was theirs; the only limitation being that other persons handling similar patterns could not secure defendants as agents or purchasers during the continuance of the contract in question. The defendants, if they purchased said merchandise outright, did not purchase the same as consumers thereof; but purchased the same for resale to consumers. Under

such circumstances, we are of the view that the Home Pattern Company had the legal right to enter into a contract with defendants obligating them not to handle like patterns for other parties. There is no unlawful combination or monopolistic trust in such transaction, and this wholly regardless of whether or not such patterns were patented or copyrighted."

The same result has often been reached in cases involving similar contracts concerning other articles than patterns.

See, for example:

Walter A. Wood, etc., Co. v. *Greenwood Hardware Co.*, 75 S. C. 378.

Staroske v. *Pulitzer Publishing Co.*, 235 Mo. 67.

W. T. Rawleigh Med. Co. v. *Osborne*, 177 Ia. 208.

Rose v. *Gordon*, 158 Wis. 414.

In the first of these cases the plaintiff sued for the price of certain mowers, rakes, etc., sold under a contract which provided that the defendant would not "accept the agency for, or sell, any other mower, hayrake," etc. "during the term of this contract." The defendant contended that the contract was invalid under the following statute (Code of Laws of South Carolina of 1902, Vol. 1, sec. 2845):

"All arrangements, contracts, agreements, trusts or combinations between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations

designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons as individuals, firms, corporations, syndicates or associations, that may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premium or prices, or seeks to control in any way or manner such tariff, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void."

The court held that the contract was valid, saying, at page 385:

"It is one of those minor contracts in partial restraint of plaintiff's right to freely sell and the defendant's right to freely buy which the common law would hold to be reasonable as a fair protection of the mutual interests of the parties, and not injurious to the public as tending to create a monopoly. . . . It is the agreement of a single independent manufacturer and a single independent dealer and not monopolistic in its tendency. The contract leaves room for the keenest competition in that community by manufacturers and dealers of similar implements. There is nothing in the complaint to show that defendant is the sole dealer in that kind of implement in that community or that the needs of the public could not be reasonably met by other dealers in similar implements."

It will be noted that the South Carolina Statute, like the Clayton Act, invalidates a contract which "tends" to lessen competition, and consequently the decision strongly supports the plaintiff's contention in the present case.

So, in *Rose* v. *Gordon*, 158 Wis. 414, which was a bill to enjoin a breach of a covenant in a lease to sell only the plaintiff's beer, the court held that there was no violation

of section 1747*e* of the Statutes of Wisconsin, which invalidates every contract "in restraint of trade or commerce" and every "attempt to monopolize any part of the trade or commerce in this state." The court said (at p. 416):

> "The restraint of trade resulting from the agreement being partial only and not operating to the prejudice of the public by unduly restricting competition, the contract is not an illegal contract in restraint of trade within the provisions of sec. 1747*e*, Stats."

The foregoing decisions show the state of the law at the time of the passage of the Clayton Act. While Congress obviously intended to change the law by the enactment of section 3, as is pointed out by Judge Anderson (p. 190), it did not intend to stamp with *prima facie* illegality contracts of this nature which had been regarded as harmless in the past, but merely to provide that they should be unlawful *if* they tended to substantially lessen competition or create a monopoly, and if the fact that they did have this tendency in any particular case were fairly proved by a preponderance of evidence.

IV

The Contract is in Reality one of Agency to which Section 3 of the Clayton Act is not applicable at all

If the object of the contract was in substance to establish a local agency for the sale of the plaintiff's product, section 3 of the statute has no application. This is conceded by every one.

In the reports of the judiciary committee on the Clayton Bill, above referred to (pp. 31–32, *supra*) are these statements:

"Section 4 of this bill has apparently been much misunderstood, and great confusion seems to have arisen in regard to its provisions. Whether designedly or from a misunderstanding of its purport, we know not, but it has been contended very earnestly that its provisions prevent exclusive or sole agencies. It not only does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatsoever relates to agencies properly so termed. . . .

The local dealer is required under the contract system to purchase and pay for each article secured for his business . . . If he cannot sell the commodity so purchased, he must go out of business. . . . The selling agencies are not in reality agencies at all, but are purchasers and owners of machines who have paid the full price therefor and the contracts condition that these same dealers will not deal in the machines of any competitor or rival company. . . . We have penalized this practice under the provisions of section 4."

From these reports, which had reference to the section in its earlier forms (see p. 32, *supra*), it is obvious that Congress was aiming at contracts of a different nature from the present. The kind of contract which it meant to make criminal were contracts of sale under which the vendee acquired the absolute ownership of the goods sold and was in no sense the local agent of the manufacturer. If this was the intention of Congress with reference to the original bill it is plain that the milder provision actually enacted was not intended to have a broader application.

It is submitted that the contract in question created a local agency for the sale of the plaintiff's product and that in spite of the fact that a limited interest in the patterns passed to the agent the contract was not one of sale within the meaning of section 3. The contract is in substance one for the rendering of service to the plaintiff,

not for the sale of goods to the defendant. The only use which the defendant could make of the patterns was to sell them to the public or return them to the plaintiff. It was subject to the control of the plaintiff, so far as the pattern business was concerned, in a variety of ways. Thus it was bound to give the pattern department a prominent position on the ground floor of its store and not to remove the department from its original location. It was further bound to purchase for free distribution specified quantities of the plaintiff's advertising publications, to pay proper attention to the sale of the patterns, to reorder all patterns that were sold, to conserve the best interests of the agency at all times, not to sell the patterns except at label prices and to permit the plaintiff's representative to take account of the stock whenever it desired. Twice a year the defendant had the privilege of returning discarded patterns at nine-tenths of their cost and upon the termination of the agreement it was bound to return all patterns remaining on hand for which it was to receive credit at three-fourths of their cost. All these provisions, coupled with the provision with reference to the "standing credit" to be maintained throughout the period of the contract, show that the contract was intended in good faith to create a local agency for the sale of the plaintiff's patterns and that it is not in any sense properly described as a "contract for sale of goods" within section 3.

The agreement not to handle other kinds of patterns was required of the defendant, not as a condition of the sale of goods to it, but as a condition of its appointment as one of the plaintiff's local representatives. Without entering into the contract at all it could have bought from the plaintiff all the patterns it wanted and the purchases would have been subject to no conditions whatever.

That the present contract is one of agency (as it was held to be in *Weiboldt* v. *Standard Fashion Co.*, 80 Ill. App. 67) would seem to be conclusively established by the decision in *Willcox & Gibbs Sewing Machine Co.* v. *Ewing*, 141 U. S. 627. In that case the court had before it a contract very much resembling the contract in the case at bar. The Willcox & Gibbs Co. had appointed Ewing its "exclusive vendor for its sewing machines" in a certain territory and had agreed among other things to sell him its sewing machines at 60 per cent. discount from its retail price list, with the privilege of buying back at the termination of the original term such of the goods sold Ewing as it might select. There were various provisions similar to those in the Standard Fashion Co. contract, but there was no obligation on the part of the Company to take back any machines upon the termination of the contract. The question before the court was whether the contract was one of agency which the principal could terminate, or a contract of sale as was contended by Ewing. It was held that Ewing was an agent. Mr. Justice Harlan, speaking for the court, said at p. 636:

> "There was some discussion at the bar as to whether Ewing was, strictly, an agent of the Company. We think he was. He was none the less an agent because of his appointment as 'exclusive vendor' of the defendant's machines within a particular territory, or because of the peculiar privileges granted to or the peculiar restrictions imposed upon him. . . . The agreement constituted him the sole agent of the company for the sale of its machines within a certain territory. It is true that the machines he undertook to sell were to be purchased by him from the company at a large discount. But he could not sell them by retail below the regular retail prices. This arrangement was the mode adopted to protect the company's interests, and to secure the plaintiff such compensation for his services as would

> induce him to devote his time, attention and abilities to the company's interest. He was still a mere agent to sell such machines as might be delivered to him under the contract."

Judge Brown recognized the authority of this decision and refers to the "long established trade usage of describing such contracts as agency contracts irrespective of the fact that the title to the goods may pass from vendor to vendee" (pp. 200–201). While the majority opinion stated that the present case is "easily distinguishable from the Willcox & Gibbs case" (p. 188), no intimation is given as to the grounds of the distinction. Judge Anderson merely proceeds to say:

> "Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers."

Without pausing to criticise the use of the expression "full title" as applied to the patterns in this case, it is enough to say that Judge Anderson's language fits exactly the situation which existed in the Willcox & Gibbs case, and there seems to be no material difference between that case and this. The contract there provided that the manufacturer would "sell" its sewing machines to the dealer; that if the connection should cease the manufacturer should "have the right to *buy* back of its goods *sold* to" the dealer such as it might select; and that the dealer should "purchase" from the manufacturer a certain amount of goods until 1875. A more absolute title thus passed to the dealer than in the present case, for there was imposed upon the manufacturer no such obligation as exists here to take back its unsold goods at the termination of the agency, yet the court held that Ewing was "strictly" an agent of the company.

With minor changes the contract between the plaintiff and the defendant could have been so worded as to reserve in the plaintiff the entire title until the sale of the patterns by the defendant instead of a reversionary interest contingent upon the failure of the defendant to sell the patterns. In that event the effect of the contract upon competition would have been identical with its effect in its present form, yet admittedly it would not have fallen within the Act. It cannot be assumed that Congress intended to make this immaterial feature the test and stamp the one form of contract with disapproval and not the other.

If a contract between a pattern manufacturer and a dealer, or a similar contract in any other branch of trade, establishes what is in effect a bona fide *local agency for the sale of the manufacturer's product, it is wholly legitimate for the agent to agree not to handle competing goods, and the validity of the transaction under the Clayton Act cannot turn on the chance incident that, technically, a qualified title to the goods, limited both in extent and duration, is vested in the agent.*

V

Such Decisions as have been made under Section 3 of the Clayton Act sustain the Plaintiff's Position

Notwithstanding the great importance of section 3 of the Clayton Act and the multitude of exclusive trade arrangements which must be now in effect in this country, the cases under this section which have thus far been decided by the courts have been very few.

The only cases, at least in the Federal courts, in which

the effect of section 3 has been considered, apart from the case at bar, appear to be the following:

Sperry & Hutchinson Co. v. *Fenster*, 219 Fed. 755 (D. C. E. D. N. Y.).

Elliott Machine Co. v. *Center*, 227 Fed. 124 (D. C. W. D. Mich.).

United States v. *United Shoe Machinery Co.*, 227 Fed. 507; 234 Fed. 127 (D. C. E. D. Mo.).

Coca Cola Co. v. *J. G. Butler & Sons*, 299 Fed. 224 (D. C. E. D. Ark.).

Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 235 Fed. 398 (C. C. A. 2d Circ.).

Pictorial Review Co. v. *Curtis Publishing Co.*, 255 Fed. 206 (D. C. S. D. N. Y.).

This court has not yet had occasion to consider section 3. Although the section was quoted in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 517, the court found it unnecessary to "make the application of this statute to the case at bar which the Circuit Court of Appeals made of it."

In *United States* v. *United Shoe Machinery Co.*, supra, and in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, supra (when in the Circuit Court of Appeals), section 3 was naturally held applicable to two of the alleged monopolies which the report of the judiciary committee upon the Clayton bill states were expressly aimed at by section 3.

The United Shoe Machinery Co. case came before the court on a motion to dismiss. The following extracts from the opinion of the court, 234 Fed., at page 149, show the nature of the allegations of the bill:

> "It is charged that by reason of these leases there is no market for anyone inclined to manufacture these or some

of these machines, and therefore all are deterred from engaging in their manufacture, as, there being no market for them, financial failure is bound to result from the attempt. Such a condition of affairs clearly tends to substantially lessen competition and create, in favor of the defendants, a monopoly in that line of commerce.

In addition it is charged in the bill that the New Jersey Company acquired and still owns the capital stock of 56 other concerns, at one time engaged in the manufacture and selling and leasing of some form of shoe machinery or supplies. The bill alleges:

'Thus the control of a complete line of principal and auxiliary machinery used in the bottoming of shoes became vested in one establishment. Before this no one company could supply such a line nor can any company do so now outside the defendants.' "

In the Universal Film Mfg. Co. case, where a license agreement covering moving picture projecting machines provided that the licensee should use only films manufactured by the licensor, the court said, at p. 400:

"The testimony shows that the complainant has a monopoly under its patents of projecting machines so that, if no films not manufactured by complainant can be used upon these machines, the complainant will obtain an absolute monopoly of the film business, in spite of the fact that its patent on films has expired. If the prohibitions of the Clayton Act mean anything at all, this case falls within them, and the restrictions as to use of films other than complainant's with the projecting machines are therefore void."

These quotations from the only cases (other than the present case) in which contracts have been held invalid under section 3 show that there is absolutely no resemblance between the situation which the courts had before them in those cases and the situation in the present case,

where there is no evidence whatever tending to show that the last clause of the section is applicable.

In the Film case the court took occasion to refer expressly to a prior case in the Southern District of New York, where section 3 was not regarded as applicable "because that case was decided upon a demurrer to a bill upon the face of which no substantial restraint of competition or monopoly in any line of commerce appeared," although the contract upon its face was similar to the contract condemned in the Film case.

The case hitherto decided which most resembles the present case is *Pictorial Review Co.* v. *Curtis Publishing Co.*, supra, where section 3 was held not applicable to the form of contract entered into between the Curtis Publishing Co. and its district agents, providing in substance, among other things, that the district agents should not supply to newsboys or dealers any periodical other than those published by the Curtis Publishing Co. without first obtaining the approval of the latter. Under the contract the district agents were *purchasers* of the Curtis periodicals. Judge Hand points out (p. 210) that the agents were much more than mere purchasers:

> "Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction, I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in co-operation with the Curtis boys than it does an outright sale to the district agents and nothing more. At any rate it has not been established with the clearness necessary to warrant the granting of a temporary injunction, that the defendant's contract referred to causes an unreasonable restraint of trade or otherwise comes within the prohibitions of the Clayton Act."

See also *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed. 566 (C. D. S. D. N. Y.), 227 Fed. 46

(C. C. A. 2nd Circ.), a case under section 2 of the Act; and *Ford Motor Co.* v. *Benj. E. Boone, Inc.*, 244 Fed. 335 (C. C. A. 9th Circ.), in which the validity of the Ford Co. uniform agency contract was sustained though without any reference to the Clayton Act.

VI

The Price Maintenance Clause of the Contract is Valid, but the Question of its Validity or Invalidity is not Material

In the majority opinion of the Circuit Court of Appeals it is said (pp. 194–195):

> "To avoid possible misconception of this opinion, we add that we do not overlook that the contract in question also contains a stipulation to maintain resale prices. The validity of this provision is not raised by the pleadings, nor has it been discussed by counsel. Whether under the circumstances of this case such resale price stipulation is invalid, we do not decide."

The only evidence relating to this stipulation was the testimony of the plaintiff's president with reference to the reason for having this clause in the contracts:

> "It has been a custom in the business ever since I have been connected with it to make contracts with the merchants, and as a matter of business we make them to cover a term of years, so that we won't have to be at the expense of sending agents around to them every year or two to get them to renew their contracts, and those contracts also renew themselves, to bring about what we consider a proper economic administration of the business. Now, a merchant signing that contract, as we see it, is entitled to expect to make a profit on the business during the time that he carries it on. If the merchant

were threatened with competition from other merchants, in the neighboring town or in the neighboring square, perhaps, in the sale of the same patterns at prices other than those at which he himself is required to sell them, he could not do business at a profit; he could not compete with price-cutting in the next block or in the next community. Now, in undertaking to take a contract with us for a term of years, it is only ordinary prudence on his part to require that he be protected in securing from the public a fixed price; and we fix the price largely in view of those considerations" (pp. 48–49).

No attempt is being made in the present case to enforce this clause, and it is immaterial whether it is valid or not.

It is submitted, however, that it is valid and that there is nothing in *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, or the earlier cases, to the contrary. In those cases the court was dealing with attempts on the part of manufacturers to control the prices at which their products should be sold by purchasers who had bought the goods from the manufacturers and had paid for them and acquired a complete title.

The present case is distinguishable on two grounds, first, because the defendant was in substance the *agent* of the plaintiff, and, secondly, because the defendant's title to the patterns was only a qualified one.

By the contract now before the court the plaintiff does not undertake to control the prices which members of the public may charge for its patterns, but only the prices which its local representatives shall charge. The local representative is not a purchaser of the patterns in the sense of having acquired complete undefeasible title. He has only a qualified title giving him the right to sell to others, but if he does not sell he must return the patterns to the plaintiff. The plaintiff has a reversionary interest

until the sale of the patterns to the public and until such sale its interest is not divested. It has a right to protect this interest by requiring its agent to maintain retail prices, and there is nothing in the decisions inconsistent with the existence of this right.

VII

Although the Time for an Injunction has expired, the Plaintiff is entitled to Relief in Equity

This was conceded in the opinion of the majority of the Circuit Court of Appeals unless the contract were deemed to be invalid under the Clayton Act.

The right of a pattern manufacturer to an injunction restraining the local dealer from violating its agreement not to handle the patterns of other makers is thoroughly established.

Butterick Publishing Co. v. *Fisher,* 203 Mass. 122.

Standard Fashion Co. v. *Siegel Cooper Co.,* 157 N. Y. 60.

Butterick Publishing Co. v. *Rose,* 141 Wis. 533.

Peerless Pattern Co. v. *Gauntlett Dry Goods Co.,* 171 Mich. 158.

Judge Brown's criticism of *Lumley* v. *Wagner* (p. 199) is belated, as the doctrine that a court of equity will enjoin the breach of a negative covenant in a contract under proper circumstances, although it cannot specifically enforce the performance of the affirmative provisions, is now thoroughly settled in the law. It is as well settled in the Federal courts as anywhere.

Singer Machine Co. v. *Union Buttonhole Co.,* Fed. Cas. No. 12904 (C. C. Mass.).

Goddard v. *Wilde*, 17 Fed. 845 (C. C. R. I.),
Chicago & A. Ry. Co. v. *N. Y., L. E. & W. R. Co.*, 24 Fed. 516 (C. C. S. D. N. Y.).
Harrison v. *Glucose Sugar Refining Co.*, 116 Fed. 304 (C. C. A. 7th Circ.).
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Reece Folding Machine Co. v. *Earl & Wilson*, 205 Fed. 539 (D. C. N. D. N. Y.).
Montgomery Light Water & Power Co. v. *Montgomery Traction Co.*, 219 Fed. 963 (D. C. Ala.).
In re Consumers' Albany Brewing Co., 224 Fed. 235 (D. C. N. D. N. Y.).
Automobile Insurance Co. v. *Guaranty Securities Corp.*, 240 Fed. 222 (D. C. S. D. N. Y.).

In *Javierre* v. *Central Altagracia*, 217 U. S. 502, referred to by Judge Brown, the contract contained no negative covenant, and, in addition, there was an adequate remedy at law.

In the present case, during the pendency of the litigation, to wit, on Feb. 25, 1919, the plaintiff's right to an injunction expired by the termination of the contract period (Opinion of Court of Appeals, p. 189). This did not, however, terminate the plaintiff's right to relief in equity by way of the assessment of damages and the Circuit Court of Appeals so ruled, citing as authority various decisions of this court (p. 189).

It is submitted that the decision of the Court of Appeals upon this point is correct, and that, notwithstand-

ing the fact that the plaintiff cannot have an injunction, it is entitled to have the validity of the contract determined and the case sent back for an assessment of such portion of its damages as it can prove.

VIII

It is therefore respectfully submitted that a writ of certiorari should issue to the Circuit Court of Appeals for the First Circuit to review its decision herein.

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No. 177

Supreme Court, U.
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Supreme Court of the United States

OCTOBER TERM, 1919

STANDARD FASHION COMPANY
PETITIONER

v.

MAGRANE-HOUSTON COMPANY
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF ON BEHALF OF THE PETITIONER

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APPEAL PRINTING COMPANY, NEW YORK

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 177.

STANDARD FASHION COMPANY,
PETITIONER,

against

MAGRANE-HOUSTON COMPANY,
RESPONDENT.

BRIEF ON BEHALF OF PETITIONER.

Statement of the Case.

This case comes before this Court on a writ of certiorari to the Circuit Court of Appeals for the First Circuit.

The questions presented are the interpretation of Section 3 of the Clayton Act (38 Stat. 731) and its applicability to the contract between the petitioner (hereinafter called the plaintiff) and the respondent (hereinafter called the defendant), which was a pattern agency contract of the usual form (Rec., pp. 130-132).

The plaintiff is a New York corporation engaged in the manufacture and distribution of patterns known as Standard Patterns. The defendant had a store at the corner of Washington Street and Temple Place in the city of Boston at which it conducted a retail drygoods business. The plaintiff brought this bill in equity in the District Court for the District of Massachusetts to restrain the defendant from violating the clause of its contract

with the plaintiff (which then had nineteen and two-thirds months to run) by which the defendant agreed not to sell or permit to be sold on its premises during the term of the contract any other patterns than those made by the plaintiff. The bill also contained a prayer for such damages as might be ascertainable.

The defendant had admittedly broken the contract by ceasing to handle the plaintiff's patterns and by undertaking the sale in its store of the patterns made by the McCall Company, a competitor of the plaintiff. The only defense to the suit was that the contract, or the clause in question, is illegal and void under Section 3 of the Clayton Act, which reads as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

At the trial in the District Court before Johnson, Circuit Judge, there was no dispute about the facts

and no evidence that the contract in question tended in any way to lessen competition or create a monopoly. Judge Johnson dismissed the bill on the ground that the negative covenant by which the defendant agreed "not to sell or permit to be sold on the premises of the second party, during the term of the contract any other make of patterns" was illegal under Section 3 of the Clayton Act; and his opinion (pp. 9-17) shows that he regarded the contract as unlawful *on its face* notwithstanding the absence of any evidence of its actual or potential effect upon competition.

The case was argued twice before the Circuit Court of Appeals. After the first argument the Court filed a *per curiam* opinion (pp. 140-143) in which they declined to pass upon the applicability of the Clayton Act and affirmed the decree of the District Court "not for the reasons assigned in its opinion, but on the ground that the negative covenant, if valid and not prohibited by the Clayton Act, does not justify the interposition of the extraordinary powers of a court of equity to grant the special relief sought."

The plaintiff thereupon filed a petition for a rehearing (pp. 143-151) which was granted and the case was then reargued before Bingham and Anderson, Circuit Judges and Brown, District Judge.

The opinions thereafter filed (pp. 151 *et seq.*) show that the Court abandoned the position it had taken in the *per curiam* opinion and affirmed the decree of the District Court, the majority proceeding upon the ground that the negative covenant constituted a violation of the Clayton Act and was invalid upon its face. Upon this point Judge Brown dissented and his opinion presents a vigorous argument to the effect that the contract in suit was not shown to be invalid under the

Act; but he concurred in dismissing the bill, solely upon the ground that the plaintiff was not entitled to an injunction because the Court could not enforce specific performance of the entire contract.

The questions here presented are whether a contract like the one under consideration is unlawful upon its face or only when the evidence establishes that its effect may be to lessen competition or tend to create a monopoly; whether the contract is, indeed, one of "sale" at all, within the meaning of the Act, or a contract of agency or of joint adventure, to which the Act does not apply; and whether if it be a contract of sale the clause which limits the use of the defendant's premises without affecting its liberty of action elsewhere can possibly fall within the prohibition of the statute.

The decision of the Court below is erroneous for each of the following reasons:

1. Because the majority of the Circuit Court of Appeals, in declaring in effect that the negative covenant in this contract was invalid upon its face, in the absence of any evidence that it tended to lessen competition or to create a monopoly, completely disregarded the last clause of Section 3 of the Clayton Act and misconstrued the section as a whole.

2. Because the existence of similar negative covenants in nearly all of the contracts of the petitioner's competitors prevents the clause of the petitioner's contracts from having any tendency toward monopoly or toward the substantial lessening of competition.

3. Because the majority of the Circuit Court of Appeals erroneously determined the contract in question to be a contract of sale within the mean-

ing of Section 3 of the Clayton Act, whereas it is in substance, as the petitioner contends, an agency contract, or a contract of joint adventure not falling within the scope of this section of the Act.

4. Because in reaching said decision the Court below relied on statements in the reports of the committees of the two houses of Congress which were not addressed to the Clayton Act as passed and thereby were misled as to its applicability to the contract in suit.

5. Because the decision of the Court below did not involve questions of fact arising from conflicting evidence, but involved merely the erroneous conclusion that under Section 3 of the Clayton Act the petition's contract with the respondent was invalid upon its face, regardless of the proven and uncontradicted fact that it had no tendency to substantially lessen competition or create a monopoly.

FACTS.

I.

Preliminary Statement.

The facts all appeared by undisputed testimony.

The plaintiff is a New York corporation engaged in the business of manufacturing and selling patterns and distributing periodical publications illustrating the garments to be made from such patterns (pp. 24, 25). The patterns made by it have been sold since 1887 under the name of Standard Patterns throughout the United States and Canada and the name is a very valuable asset (p. 27). It sells it patterns direct to the consumer to a certain extent, but markets them in the main

through about 6,000 local agents, like the defendant, under contracts uniform with that involved in this case. Dry goods stores where piece goods and fabrics of that kind are sold make the most desirable agencies (p. 26), and the defendant's store by reason of its location in the precise centre of the shopping district of Boston and its favorable reputation "as a great piece goods store" affords a peculiarly valuable location for an agency (pp. 43, 44).

The plaintiff's patterns have been sold in Boston for at least 28 years through different agencies (pp. 27, 28).

The contract between the plaintiff and the defendant (Plaintiff's Exhibit 7, pp. 131-133) was entered into at the solicitation of the latter upon the expiration of a contract which the latter had had with the manufacturers of the Ladies' Home Journal patterns (pp. 29, 30). The plaintiff received no notice of termination from the defendant within thirty days after the expiration (on Nov. 25, 1916), of the first term of two years (p. 31), and consequently the contract was automatically extended for another term of two years and could not be lawfully terminated by either party until the expiration of three months after the end of such term, that is to say, until Feb. 25, 1919, (Op., C. C. A., pp. 151, 152).

The clause in the contract forbidding the defendant to handle on the premises in which the agency is conducted, other makes of patterns has been in the plaintiff's contracts for a great many years (p. 56) and in accordance with the general custom of the trade is found in nearly all the agency contracts of all the pattern manufacturers in the country (pp. 35, 36, 44, 45, 77, 78).

On July 9, 1917, the defendant broke the con-

tract by discontinuing altogether the sale of the plaintiff's patterns and the distribution of its advertising material and by installing in its store in place thereof the patterns and advertising material of the McCall Company, one of the plaintiff's competitors (p. 33; Op. D. J., p. 10). It appeared that several months before, to wit, on Feb. 2, 1917, the defendant had, without the plaintiff's knowledge, made a contract with the McCall Company whereby it was to become at an early date "special agent" at Boston for the sale of McCall patterns (Plaintiff's Exhibit 17, pp. 136-139).

At the time of the breach of contract the plaintiff had but one other agency in the retail district of Boston. That agency was in the store of R. H. White Co., and the contract with that company, entered into on Feb. 7, 1917 (p. 54), contained an agreement on the part of the plaintiff that it would not maintain any other agency within a quarter of a mile of the White store except that in the defendant's store (pp. 40, 76).

Having no adequate remedy at law because of the obvious impossibility of ascertaining the full amount of its damages, the plaintiff brought this suit in equity, relying on *Butterick Publishing Co.* v. *Fisher*, 203 Mass., 122, and similar cases, hereinafter cited. The defendant offered no justification in fact for its breach of contract and merely claimed that Section 3 of the Clayton Act invalidated the agreement.

The purpose of the suit was to maintain the plaintiff's right to continue to transact business in the same manner as it had done for many years.

II.

There is a complete absence of evidence that this contract or this form of contract has tended to lessen competition or to create a monopoly or might have such tendency.

The principal pattern manufacturing companies conducting a business similar to that of the plaintiff are the McCall., the New Idea Co., the Pictorial Co., the Butterick Publishing Co., the Home Co., the Peerless Co., and the May Manton Co. All of these concerns except the May Manton Co., market their products through local agencies in substantially the same way as does the plaintiff (p. 35). By the general custom of the trade substanially all pattern agency contracts contain a clause like that in the contract between the plaintiff and the defendant, to the effect that the agent shall not handle on the premises where the agency is conducted, the pattern of any other maker (pp. 35, 44, 45, 77). This custom has recently been given up by the McCall Co., whose new form of contract eliminates most of the agency features of the plaintiff's contract, but of the 12,000 agencies of that Company all but 300 to 400 are still acting under the old form of contract, which contains the clause in question (pp. 112-114). The representative of the McCall Co., who testified for the defendant could name no other company which has eliminated this clause from its contract (p. 114). There was undisputed evidence that very few stores in the country have handled two kinds of patterns at the same time (pp. 78,98).

No attempt was made by the defendant to show by evidence that the effect of the contract either

had been in the past or might be in the future "to substantially lessen competition or tend to create a monopoly," either in Boston or anywhere else.

On the contrary it appeared without contradiction that competition in the pattern business has grown continually more and more severe, that new pattern companies have been organized and have acquired a large trade, and that there are to-day many more companies in existence and doing a larger business than was the case 20 or 30 years ago. When the plaintiff began business in Boston some 28 years ago, the only other companies in the business were the Butterick Co., the Demorest Co., and the Imperial Co. (p. 40). The McCall Co., and the other large companies above referred to have been organized and started business since that time and several of them within recent years (p. 42).

The plaintiff has about 6,000 agencies in the United States, and, in round numbers, the Butterick has 10,000, the McCall Co. 12,000, the New Idea Co. 4,000, the Home Co. 5,000 to 6,000 and the Pictorial Co. 6,000 to 8,000. In all there are about 52,000 pattern agencies in the United States (pp. 42, 43, 106).

There was no evidence that any of the other pattern companies have ever had difficulty in establishing proper agencies in Boston. All of them except the Peerless Co. have at least one agency in the retail district of Boston within 750 feet of the defendant's store (pp. 40, 41, 90, 91). The McCall Co., for example, already had three other agencies in that territory before it succeeded in establishing another with the defendant by inducing it to break its contract with the plaintiff (pp. 41, 90). At the time of the breach of the contract the plain-

iff had only one other agency in the retail dry goods section of Boston (p. 42).

Instead of making monopolistic profits, the evidence showed that the plaintiff made no money at all during the last year before the trial of this case (p. 68).

Mr. Scanlon, the president of the plaintiff Company, testified without contradiction that it is not advisable and has not been the custom for a pattern company to seek a very large number of agencies in a small city or in any particular section of a large city, and he explained the reason why (p. 42). It is obvious that the obligation to take back unsold patterns sets a limit to the number of agencies which any manufacturer can profitably establish in a given locality (pp. 36, 37).

The actual conditions existing at the time of the defendant's breach of its contract with the plaintiff showed the futility of the contention that the contract with the defendant tended to monopoly. The available stores in the retail district were divided among the various competing companies, each store handling patterns of one manufacturer only, under agency contracts, and there was no evidence that any pattern company was having any difficulty in marketing its product or that its business was not effectively handled by its local representative (pp. 43, 45, 88). The plaintiff itself had definitely agreed with the R. H. White Co., with which under a contract made in February, 1917, it had established its other agency in Boston, that it would not maintain any other agency within a quarter of a mile of the White store except the one with the defendant, and the territory thus described includes the entire dry goods district of the city (pp. 40, 76). The pro-

prietors of all the other available stores had existing contracts with other pattern companies (pp. 44, 45, 80). Hence at that time as a matter of fact the clause in question in the defendant's contract cannot have had any tendency whatever toward the lessening of competition or the establishing of a monopoly in the pattern business in Boston.

The complete absence of any evidence indicating that the contract in question tended to lessen competition or create a monopoly was the principal reason for Judge Brown's dissent from the opinion of the majority of the court on the question of the Clayton Act, and for his conclusion that the decision gives no effect to the last clause of section 3 (pp. 157 *et seq.*).

The one piece of evidence relied on by Judge Johnson in the District Court and by Judge Anderson in the Circuit Court of Appeals as tending to show a monopolistic tendency on the part of this contract, is the admitted fact that the plaintiff Company is controlled by a certain holding company which also owns the stock of the Butterick Publishing Co., and the New Idea Co., and that the three companies between them have 20,000 agencies out of a total of 52,000 in the United States (p. 106).

The existence of this number of agencies is simply a condition co-existent with the presence in the agency contracts in the trade generally of the restrictive covenant, and neither the number, nor the distribution of the agencies among the plaintiff's competitors, is or can be the result or effect of the negative covenant either in plaintiff's contracts or those of its competitors, or of the contracts themselves.

It appeared that the officers of the three com-

panies, The Standard Fashion Company, The New Idea Pattern Company and The Butterick Publishing Company are different and that they are managed entirely as distinct concerns without any agreements among them (pp. 83, 84, 107, 108). There was no evidence that competition had been destroyed or lessened as between these three companies (p. 107) or that they had parcelled out the territory among themselves or had in any way sought to restrain trade or create a monopoly. Nothing whatever appeared except that they had common stockholders. Furthermore the relation between the three companies has existed for a great many years (p. 108), and there was no evidence whatever as to the number of agencies which the three companies had at the beginning of the period, or whether the number as compared with those of the other companies had increased or diminished during the period, or that the situation had been in the slightest degree affected by the exclusive feature of the agency contracts. On the contrary, the record shows that since the plaintiff commenced business every one of the 32,000 agencies of the companies other than these three had been established. During all of its 30 years of existence the plaintiff had succeeded in establishing but 6,000 agencies. The suggestion that its contracts tend to monopoly is made by the defendant in the interest of its new contract with the McCall Co., a concern which has come into being and has established some 12,000 agencies (pp. 40-43) in spite of the restrictive covenant in the contracts which the plaintiff has in the meanwhile been making with its much smaller number of agents.

In the face of the experience of 30 years it is

idle to contend that the plaintiff's contracts with its local dealers tended to lessen competition or to create a monopoly or that there is any likelihood of their having such tendency in the future.

It is indeed manifest that the very fact that the exclusive covenant exists in nearly all of the 46,000 agency contracts of the plaintiff's competitors, which is in accordance with the almost universal custom of the pattern trade, has prevented and must continue to prevent the acquisition of any monopoly by the plaintiff or any other company as no company can secure as a local agent any of the thousands of stores where the patterns of a competitor are sold under such a contract.

III.

The reason for the custom of restricting local dealers to one make of patterns and its advantages.

The plaintiff sells its patterns direct to the public to a considerable extent, partly at its sales rooms and partly by a very considerable mail order business. In the sales thus made direct to the public, the plaintiff does not undertake to impose any condition whatever on the purchasers (p. 39).

The custom of pattern manufacturers to stipulate with the local dealers handling their product that the latter should not sell on the premises, where the agency is conducted, during the term of the contract with one manufacturer, any other make of patterns, grew out of the peculiarities of the pattern business. Upon this point the plaintiff's president testified at the trial, and no attempt was made to contradict his testimony.

Patterns are a very perishable article. They are made in a great variety of styles of which a

considerable proportion changes very quickly. Of those made by the plaintiff some 1,200 different styles are current at the same time and about 60 new styles are produced each month. Each style is cut in different sizes, the number of which on the average is seven. Each local dealer should carry at least two sizes of nearly all the styles (p. 27). It follows that a large stock of one make of patterns necessarily occupies a given space and that dealers, having only a limited space which can be devoted to patterns, would have to devote substantially double the space to two makes of patterns that is required to handle one, since the supply cannot be restricted to one-half as many of each make as would naturally be carried of one make alone, without rendering the stock altogether inadequate as to each kind (p. 37).

The testimony showed that the custom of the pattern business by which local dealers or agents are resricted to one kind of pattern has subserved the interests not only of the parties to the contracts, but of the public as well. The plaintiff's president testified at some length upon this point (pp. 36-38) and he was not contradicted. The defendant called as one of its witnesses an expert (Rotheroe) auditor and assistant treasurer of the McCall Co., the beneficiary of the defendant's breach of contract in this case, and if the facts were not as stated by Mr. Scanlon, it is fair to assume that testimony in contradiction would have been elicited from this witness. As has been said, patterns are not articles of which the retailer may advantageously carry two stocks, as each stock must contain substantially all of the very numerous styles and the carrying of two kinds of patterns results in practically doubling the retailer's expense with reference to

patterns without increasing his sales. If the agencies are not exclusive in the sense referred to, the manufacturer must stand the additional cost incident to the necessary maintenance of more agencies and the obligation to take back more unsold patterns. The result of these conditions is that the public must pay the higher prices necessary to cover the increased expenses of manufacturer and dealer.

For example, in the ordinary town of 10,000 inhabitants there are 5 or 6 stores each of which handles a different kind of pattern. The evidence shows that the total amount of pattern business would not be increased if each of these 5 or 6 stores handled all the patterns made, but on the contrary there would be an enormous waste to the manufacturers and to the local dealers and a substantial increase in cost to the consumers, who must necessarily in the end pay the increased expense of transacting the business (pp. 45-46).

There was no evidence that anybody would benefit by the elimination of the exclusive feature from pattern agency contracts, or that its presence has worked hardship to anyone in the past.

IV.

The nature of the contract now before the Court—one of agency, or, if not of strict agency, of joint adventure.

The contract admittedly has some of the elements of sale, but the agency features so predominate as to determine the real nature of the contract. It establishes, as its language reads, "an Agency for the sale of Standard Patterns" (p. 130). *Its object is not to sell patterns to the local dealer, but to sell them through the local dealer to the public.* If they are not so sold the dealer *must* return

them and the manufacturer *must* take them back at the expiration of the contract. While the dealer gets an interest in the patterns, he does not get full title. The only use which he can make of the patterns is to sell them to the public or return them to the plaintiff. His rights are strictly limited also as to duration, for they cannot extend beyond the termination of the contract period. If the patterns have not then been sold they must be at once returned and his interest in them ceases. He is not a mere vendee but is an agent bound to promote the plaintiff's interests in various ways. His duties to the plaintiff are by no means fulfilled upon payment of the price stipulated to be paid for the patterns.

That the contract in the present case is in substance one of agency, broadly speaking, or at least of joint adventure in the sense that both the plaintiff and defendant are interested in the conduct of the business is plain from a consideration of its provisions. While it is true, that with the limitations above described the agent "purchases" the patterns, the plaintiff nevertheless retains an interest in them so long as they remain unsold in the possession of the agent. It is obliged to take back during two periods of each year, at 90 per cent. of the cost, such of them as are discarded, and to take back at the expiration of the contract, at 75 per cent. of the cost, all that remain unsold, and the agent agrees unconditionally to return all that are unsold. By virtue of these provisions the ultimate financial result to the parties cannot be determined until the termination of the relationship and the ascertainment of the value of the patterns remaining on hand, and throughout the entire contract period the two parties are mu-

tually interested in what is really a joint commercial enterprise. The relationship between them is obviously entirely different from that ordinarily existing between vendor and vendee.

The interest of the manufacturer in the development of the business, and particularly in having its patterns sold through the agent to the public, is safeguarded by the various provisions of the contract by which the agent obligates himself to promote the manufacurer's interests. Thus the agent agrees to buy a quantity of fashion sheets and handy catalogues annually for free distribution, to keep the pattern stock up to a certain minimum at all times, to "pay proper attention to the sale of Standard patterns" and to "conserve the best interests of the *agency* at all times" and to "re-order promptly all patterns as sold"; and he further agrees to "give the department a prominent position on the ground floor of the store" and not to remove the department "from its original location without the written consent of the manufacturer"; and to permit the manufacturer to "take account of the pattern stock whenever it desires"; and he agrees to return promptly at the expiration of the contract all patterns remaining unsold. Fifty per cent. of the purchase price of the original stock of patterns shipped to the agent remains unpaid as a "standing credit" throughout the period of the contract, and at the end of the period is not liquidated in cash, but by the return of the patterns remaining on hand. These features of the contract differentiate it from one of sale and give it the distinguishing characteristics of an agency or joint adventure.

It appears from the course of business between the parties and even from the allegations in the answer herein, that the defendant itself did not re-

gard the contract as one of absolute sale, or one in which the title to the patterns was vested in the defendant. When the defendant terminated the contract it returned the stock of patterns to the plaintiff (pp. 53, 54), and in the answer the patterns are treated as the plaintiff's patterns.

In the answer (p. 7) the transaction is inferentially described as an agency, for the defendant alleges that at the time the contract was made "the plaintiff had no *other agency* for the sale of its product among the immediate competitors of the defendant" (which the evidence shows was not the case) and again "that early in 1917, the plaintiff installed its product and opened an *agency* in the store of R. H. White Co., * * * which *agency* the plaintiff still maintains"; and on page 8 there is an expression "that the plaintiff by reason of its opening *another agency* in competition with the defendant."

ARGUMENT.

I.

The Circuit Court of Appeals put its decision entirely on the ground that the contract was invalid under Section 3 of the Clayton Act.

(a) The Court agreed with the plaintiff that at the time suit was commenced the contract had not been terminated.

The Court said:

> "The contract is dated November 25, 1914. Its first two-year term ran to November 25, 1916; failing the three months' notice within thirty days thereafter, the contract then ran until November 25, 1918. Then for thirty days there was another opportunity to give the three months' written notice of termination * * * We think the negative covenant (assuming for the moment it and the rest of the contract to be valid) is applicable to the entire life of the contract construed as to duration as we have indicated; that the contract shows a clear intention of the defendant to be bound for successive terms of two years, and for three months after notice of termination. We adopt, therefore, the construction put upon the contract by the court below. * * * The plaintiff consequently admits that its right to an injunction expired on February 25, 1919" (pp. 151, 152).

The suit was commenced July 25, 1917.

(b) The Court agreed with the plaintiff that it was entitled to an injunction when the suit was commenced unless the negative covenant was invalidated by Section 3 of the Clayton Act.

The Court said:

"Construing the contract as a whole, we do not think it can fairly be held so ambiguous as, if valid in all its provisions, to warrant the court in refusing the injunction prayed for" (p. 151).

(c) The Court was of opinion that the expiration of the contract during the pendency of the suit did not deprive the Court of jurisdiction to accord such relief as was proper.

The Court says:

"The plaintiff insists, and rightly, that the gist of the case is whether the Clayton Act invalidates its contract in whole or any part, and that the fact that its right to an injunction has expired *pendente lite*, does not relieve the court from the duty of determining the issues admittedly alive and involving substantial rights at the time of the argument of the appeal in this court" (p. 153).

"But the plaintiff insists that the fact that relief by injunction has now become inappropriate by reason of lapse of time does not warrant the court in refusing to retain jurisdiction in equity for the purpose of granting any appropriate relief, though it be only for the assessment of damages" (p. 152).

II.

The Court made no findings of fact. The case is not one where any controversy of fact is involved.

If the Court will refer to the opinion, hardly a statement of fact can be found. The only two statements of fact are found and appear in the following quotation from the opinion:

"In effect the plaintiff admits that the only way of escape from the condemnation of the

> statute is for the court to hold that this negative covenant may not 'substantially lessen competition or tend to create a monopoly.' * * * It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company, controlling it and two other pattern companies, control approximately two fifths" (pp. 155, 156).

The Court is in error. The plaintiff made no such admission, as an examination of the record will show. (See bottom of page 23.)

The court did not attempt to review the evidence but based its decision on pure conjectures and suppositions drawn from the face of the contract.

The second statement is immaterial. The number of agencies controlled by the holding company is *not* one of the effects of plaintiff's contracts.

III.

The Court reached the conclusion as to the effect of the Clayton Act by a misinterpretation of the limitation found in the proviso which makes invalid only those contracts "where the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The Court said:

> "The language is 'may be,' not 'is' or 'will be.' In order to condemn the negative covenant, it is not necessary that the court should find that it *will* lessen competition or *will* tend to create a monopoly; it is enough to find that it *may* lessen competition or *may* tend to create a monopoly. * * * For present purposes, the fact that this section was amended in conference before final enactment we re-

> gard as of little or no significance. The reports of the two committees illuminate the evils and dangers in the trade situation with which Congress was undertaking to deal. As frequently happens, debate and conference modified the legislators' views as to the best method of dealing with the evils aimed at. But we find no abandonment of the main purpose expressed in these committee reports" (p. 156, 155. Italics ours.)

The House bill made every contract containing such a condition unlawful and provided for criminal punishment for making the same. The Senate rejected this and proposed to make only contracts of owners of patents containing such a condition invalid. The House refused to accede to the Senate bill and the bill went to conference. The conference rejected both the Senate and House bills and adopted the section in its present form with this proviso—"where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce"—and only in such case invalidated the contract. (See History, Appendix A *infra*, p. 87).

The foregoing clearly demonstrates that there was a change in the manner of effecting the purpose, as to which the Court said, "We find no abandonment of the main purpose expressed in these committee reports," and the Court therefore in following the reports was misled as to the meaning and effect of the Act as finally passed.

The Court treated the section as though the final proviso had not been inserted.

The opinion of Brown, J., dissenting as to the construction of the Clayton Act, very properly

said, "From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon its face, and that the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect" (p. 160).

IV.

The Court below was in error in holding that the contract was bad on its face without any evidence that it tended to substantially lessen competition or to create a monopoly within the meaning of the Clayton Act.

In the complete absence of evidence showing that the contract in question had or might have any substantial effect upon competition, the decision of Judge Johnson in the District Court and that of the majority of the Circuit Court of Appeals amounted to a ruling that the contract was illegal upon its face.

As Judge Brown pointed out in his opinion dissenting from the majority view (p. 200):

> "The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden is upon him who asserts illegality. The application of the statute should be made only upon

full proofs. The consequences of applying it otherwise are too serious to be disregarded."

The majority opinion on the other hand erroneously states the question as if the burden were on the plaintiff to prove that the contract might not restrain competition:

> "The plaintiff admits that the only way of escape from the condemnation of the statute is for the Court to hold that this negative covenant may not 'substantially lessen competition or tend to create a monopoly.' No such finding can be made" (p. 193).

The plaintiff made no such admission.

In the first place it contends that the contract is one of agency or joint adventure to which the statute has no application.

In the second place even if the contract is to be treated as one of sale within the meaning of the statute, the plaintiff denies that the burden of proof rests on it to establish its legality, but maintains that the question before the Court was whether the evidence justified an affirmative finding that the particular contract in question, under all the actual conditions existing at the time, tended to the suppression of competition or the creation of a monopoly within the meaning of the statute.

Full weight must, as Judge Brown says (p. 196), be given to the final clause of Section 3 of the Act:

> "From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon its face, and that the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemnation of a large body of

existing contracts because of their verbal form, irrespective of their actual or probable effect, and in recognition of the fact that where there is an established monoply competition cannot be instituted or maintained unless the new competitor in the field can make a contract with someone to handle only its own goods and not to handle the goods of a company already dominating the field; that if such contracts were to be condemned irrespective of the trade in which they were made this might lead to effective suppression of competition, by enabling an established monoply to place its goods in the shop of every competitor" (pp. 198-199).

The language of this Court in the case of the *Duplex Printing Press Company* v. *Deering, et al.*, decided January 3, 1921, with reference to Section 20 of the Clayton Act is very illuminating in this case. The Court there said:

"* * * it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confine it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present or prospective. The extensive construction adopted by the majority of the Court below virtually ignores the effect of the qualifying words."

V.

The majority of the Court below misinterpreted Section 3 of the Clayton Act, and declared the provision in plaintiff's contract unlawful as a result of that misinterpretation.

The majority of the court below decided this case wholly upon the ground that the statute was intended to prohibit any restriction of the class mentioned which may possibly lessen competition or possibly tend to create a monopoly. It distinctly stated that it was not necessary that it should find that the contract or condition has lessened or will lessen competition or has tended to create a monopoly or will tend to create a monopoly, and said: "The language is 'may be' not 'is' or 'will be'" (p. 156), and "Restrictions of this sort that *may* substantially lessen competition or tend to create a monopoly are condemned as strongly in the final, as in the original draft" (p. 155). The difference between these "drafts" will be considered later.

It will be thus observed that the court has treated the words "where the effect * * * may be" as equivalent to the word "may" when defined as "possible." None of its other definitions are considered. The idea of actuality or substance which is conveyed in the word "substantially" and in the clause "in any line of commerce," is wholly eliminated for the Court said that the intent of Congress was to deal with "Competition, actual or potential" (p. 155).

It will be observed however that the decision rests exclusively upon the suppression of possible competition and possible monopoly, and that the idea

of actual existence or probable existence has been given no place whatever in the opinion.

The intent ascribed to Congress is not found in the act as passed, but is spelled from the reports of the Judiciary Committees of the House and Senate with regard to a section of the bill which was subsequently abandoned.

The interpretation thus placed upon the statute by the Court is erroneous for the reason that it gives *no effect whatever* to the proviso at the end of the section or to any word or phrase contained therein, and condemns the contract *on its face.*

That the majority of the court reached its conclusion as to the effect of Section 3 through a misinterpretation of the limitation or proviso "where the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce," seems plain from the history of the legislation, from the circumstances under which the limitation was inserted, and from a consideration of the meaning of the words contained in the limitation.

The history of the legislation which resulted in the enactment of Section 3 is presented in Appendix A (*infra*, p. 87 *et seq.*).

From this history it appears that when the Clayton Bill was originally introduced in the House, it contained a Section numbered 4, which would have made criminal *the making* of a lease or sale of goods on the condition that the purchaser thereof shall not use or deal in the goods of a competitor of the lessor or seller (infra, p. 88). That section at the same time would have made *every* lease or contract of the kind described unlawful utterly regardless of whether the effect of the condition was to foster and develop competition and

to break down monopoly, or its affect was to lessen competition or to tend to create a monopoly.

When the House Committee introduced the bill, it presented a very elaborate report as to what it intended to do by Section 4, and how it expected to accomplish its purpose (*infra*, pp. 89, 90). The underlying scheme, so far as it affects the case at bar, was to make all contracts for sale upon condition that the purchaser shall not deal in the goods of a competitor of the seller, unlawful without regard to whether or not they interfered, unduly or otherwise, with competitive conditions. The majority of the Court below quoted very copiously from that report in its opinion (pp. 154, 155). The Court, we submit, was unduly influenced by these reports in interpreting the final limitation so as to make *all* such leases and sales or contracts for sales unlawful, *no matter what may have been their effect in the past, or what may be their probable or actual effect in the future.* But that Section never became a law.

When the bill went to the Senate, the Senate Committee on Judiciary eliminated the criminal features, and recommended the adoption of the section in an amended form, which it later withdrew in its entirety (*infra*, p. 92).

When the Senate Committee on Judiciary reported the bill, it also made an elaborate report in which it reiterated the language of the House Committee report as to Section 4. The Court below also quoted at length from the Senate Report (p. 154). The Committee made an explanation as to the purpose of Section 4, as recommended, which appears not to have been considered at all by the majority of the Court below. That explanation, as will be seen from the history (*infra*, p.

92), is that the Senate Committee rejected the House Section 4, because the Federal Trade Commission Act had been passed in the meantime, and the Federal Trade Commission had been authorized to deal with the subject matter of House Section 4. The Senate Committee in its report suggested it should be amended (*infra* p. 92). A comparison of the House Section with that recommended by the Senate Committee (*infra*, pp. 88, 92) shows that the substantial change made by the Senate Committee was to eliminate the criminal features of the bill. The obvious recommendation that should have been made in view of the enactment of the Federal Trade Commission Act was that the section be stricken out entirely. The realization of this appears to have dawned upon the Committee after its report had been printed and presented, for when the bill came on for consideration in the Senate, the Senate Committee recommended that Section 4 be entirely abandoned because the subject matter thereof had been more effectually and fairly dealt with in the Federal Trade Commission Act (*infra*, pp. 92, 93). The Senate accordingly struck out the section in its entirety.

It will thus be seen that the reports of the House and Senate Committees upon which the majority of the Court below placed such reliance were made with respect to a proposed section of the law which was finally rejected and abandoned by both Houses.

All that was quoted by the majority of the court below in its opinion was what was said by the Senate or House Committee with respect exclusively to the section of the bill that was rejected. The only report made by any committee with re-

which was radically changed, and not to the one adopted.

Section 3 as finally enacted (insofar as it is applicable to the contract in suit, if that be a contract of sale) makes unlawful a contract of sale on the condition that the purchaser shall not deal in the goods of a competitor of the seller *only* "where the effect * * * may be to substantially lessen competition or to tend to create a monopoly in any line of commerce."

The court below, unduly influenced by what it conceived to be the intent of Congress as evidenced by these committee reports which were not directed to the act as passed, construed Section 3 exactly the same as it would have been construed, if this final limitation were not inserted in the Act at all.

During the progress of the debates in Congress, it was pointed out time and time again that a provision that the purchaser shall not deal in the goods of a competitor of the seller was often as effective in preventing a monopoly as it was in creating it, and as often as conducive of competition as restrictive of competition. Many examples were cited, but the general principle was that where a field is fairly well covered by a monopoly, or a concern with large capital, there is only one way in which a new manufacturer can get into the field and that is to secure representation by which he can *keep* his goods on the market until the public have an opportunity to judge them on their merits, and that a monopoly or largely capitalized concern could avoid the act by consigning its goods, a plan not available to a smaller competitor. A small competitor can only accomplish that through a contract which insures

to him the exclusive sale of his goods in a particular place for a definite period. Unless the goods of a monopoly or highly capitalized concern are excluded from such place by valid contract, the monopolist or largely capitalized concern can drive out all competition by underselling the new competitor to the dealer, or by consigning his goods with an agreement that the dealer shall no longer handle the goods of the new competitor.

It is thus plain that the intent of the Conference Committee and of Congress was to make Section 3 as it was enacted apply only to those cases in which the result of the contract (the effect) was such as either seriously to threaten or actually to accomplish a substantial lessening of competition or an actual tendency toward monopoly, and that Congress intended where the result in the past has not been to substantially lessen competition or tend to create a monopoly, that such contracts shall not be within the condemnation of the act.

The majority of the learned court below it would seem was constrained to ignore that feature of the limitation in its endeavor to give to the section an interpretation consistent with what it supposed to be the intent of Congress as evidenced by these committee reports.

It must, of course, be assumed that Congress inserted the proviso for some purpose, and it must obviously be given full effect. The only reasonable meaning which it can have is that contracts of this character are to be declared unlawful only where they are shown to have some actual or reasonably probable effect upon competition, and not where such effect is merely *possible*.

If that proviso was intended to apply to such

contracts as may possibly tend to lessen competition or possibly tend to create a monopoly as the court below held (p. 156) that limitation was wholly superfluous. All contracts for sale of goods on condition that the purchaser shall not deal in the goods of a competitor have the possibility to tend to lessen competition or to create a monopoly.

It is submitted that the majority of the court below misinterpreted this proviso.

The court first took up the title to the act, then certain isolated extracts from the Report of the Senate Committee on the Judiciary; then certain isolated extracts from the Report of the House Committee on the Judiciary, and followed with the conclusion that they found no abandonment of the main purpose expressed in the Committee Reports (pp. 154, 155).

The court clearly stated what it conceived to be such "main purpose"—to deal with "Restrictions of this sort that may substantially lessen competition" etc. (p. 155)—although it is quite manifest that if Congress had so intended, it would have been much easier to have phrased the statute to read "where such contract for sale may substantially lessen competition", instead of "where the *effect* * * * may *be* to *substantially* lessen competition." The words "effect," "be" and "substantially" are given no meaning by the court below.

Having thus determined what it believed to be the legislative intent—to make unlawful every contract for sale with a "restriction of this sort that *may* substantially lessen competition"—the Court construed every word, phrase, clause and term of the section so as to square with such conceived intent, and gave no meaning whatever to

any word, phrase, clause or term which negatived such conceived intent.

The interpretation placed by the majority on Section 3, as enacted, turned upon the meaning of the words "may be" (p. 156).

The interpretation put by the court below on the words "may be" in the last clause of Section 3—"where the effect of such * * * contract for sale or such condition * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce"—seems to be quite wide of the mark at which the statute was aimed. The words "may be" are to be taken to relate to the future in the sense that they refer to a situation disclosed at the time the question of the effect of the contract arises. To say that the words "may be" refer to a conjectural or possible lessening of competition or tendency to create a monopoly which does not in fact exist, is to attempt to legislate for Congress and to ignore the obvious purpose of the legislation Congress actually enacted.

All things are possible to him that believeth. It requires a very dull imagination not to be able to conjecture a lessening of competition or a tendency to create a monopoly by any contract for the sale of goods. The number of contracts may be increased, the restriction may be more stringent and a host of circumstances which require no especially acute intelligence to imagine may bring about a lessening of competition or a tendency to create a monopoly at some possible time. To suppose that Congress was dealing with fancies of this description and that the courts were endowed with jurisdiction to give rein to their imaginations with respect to possible lessenings of competition

or tendencies to create monopolies, is to attempt to draw to the courts an authority which Congress never has conferred and never will confer on any body whatever.

Nor is the matter helped by disguising what is merely possible or conjectural with the cloak of the word "potential." What is "potential" lessening of competition? We suppose it may be said to be any lessening of competition that may be brought about, and again we are in the land of imagination and dreams. We do not think it worth while to discuss propositions so plainly at war with the statute. Congress used the words "may be" in the sense of futurity so that the act passed in 1914 would apply to transactions at a subsequent period, where at the time the effect of the transaction would be to substantially lessen competition or tend to create a monopoly.

The facts show that the effect of the contract in this case has not been and is not to lessen competition or to tend to create a monopoly and that in fact the effect is and has been to foster competition and to prevent a monopoly. The case is absolutely bare, so far as a lessening of competition or tendency to create a monopoly is concerned, of anything but conjecture and imaginings about possibilities. For a lessening of competition and tendency to create a monopoly could only result from a reversal of the experience of the past which is not either natural or to be expected.

A consideration of the provisions of Section 7 of the act will aid in construing Section 3. The first paragraph of Section 7 provides that no corporation shall acquire stock of another corporation "where the effect of such acquisition may be to substantially lessen competition" between the

two corporations "or tend to create a monoply of any line of commerce." The third paragraph of this section provides, "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or attempting to bring about, the substantial lessening of competition."

The plain intent of section 7 was to put the criterion, where the purchase was solely for investment, on the actual use made of the voting power acquired. Until and unless the voting power of the shares acquired is *"used"* to bring about, or to attempt to bring about, the substantial lessening of competition, the acquisition is not prohibited. Even if the voting power is used to lessen actual competition, the proviso still applies if the competition is not "substantially" lessened by the use of the voting power. Further it was not sufficient that the two corporations occupied competitive fields and were actually engaged in important competition. Nothing else can be meant by the proviso that the shares are not used "to bring about, or in attempting to bring about, the substantial lessening of competition." It would be difficult to suppose at any rate that competition that did not exist could be lessened. But certainly competition that does exist can be lessened, and substantially lessened; and hence there is no escape from the conclusion that the fact that such competition between the two corporations did exist was not to take the acquisition of the shares out of the proviso in case the shares were not used by voting or otherwise to bring about, or in attempting to bring about, the lessening of competition.

The proviso does not turn even on the absence of voting power, for if there is no voting power it

would be impossible to use the shares by voting to bring about the described result.

Congress was aiming at holding companies, and it had no desire to restrict investments which were not improperly used. Congress had some regard for enterprise and the success of business in this country. Congress was not legislating in a vacuum. It was asserting a control over vital currents of the country's trade. Congress drew the line at the abuse of the voting power and not even at the existence of actual and important competition.

The Clayton Act is to be construed as a whole and the same words when used in different parts of the act are to be given the same meaning if the context does not require otherwise.

Congress was not prepared to enact a statute condemning all contracts on condition that the goods of a competitor should not be dealt in. Congress had that sort of a statute under consideration, and declined to enact it. The statute it did enact took account of the rule of reason. Congress declined to fetter trade by conjectures and imaginings.

So far as Section 3 is concerned, the words "may be" are susceptible of two quite different meanings depending entirely upon which of the two words is accentuated. If the word "may" is emphasized, the words "*may* be" convey the concept of potentiality or possibility, without any relation whatever to atcual existence or being; but if the word "be" is emphasized, the words "may *be*" convey the concept of probability, existence and being. Accentuation on the first of the two words precludes any reasonable meaning being given to the word "be," which of itself implies

some kind of existence; while accentuation on the second does not destroy the real meaning of "may" and gives some significance to the word "be."

The Court said (p. 155): "Competition, actual or potential, was the object of Congressional solicitude."

There is nothing in the report of either the House or the Senate Committee regarding potential competition or potential monopoly. The only suggestion approaching such an idea is found in that part of the Senate Committee report stating "the theory of the bill" in which appears the clause "to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation." p. 154). Apparently the majority construed these words to mean "before creation" instead of "before consummation." Obviously the language refers to a situation actually created which is developing into a trust, conspiracy or monopoly, but which has not been consummated.

It is quite doubtful whether *potential* competition was the object of Congressional solicitude at all. It would appear that its solicitude concerned the suppression of *actual* competition, and in an attempt to correct the evil brought about through the abuse of so called "tying contracts," the Committee decided to abolish their use entirely. Be that as it may, the observation of the Court can be justified only when made concerning the bill in its discarded form. It cannot be justified as to the final enactment where the words "substantially lessen competition" are employed. "Potential" is the opposite of "actual." There can be no substantial lessening without an actual less-

ening. The presence of the word "substantially" in the statute precludes the idea of a potential lessening. To write the word "potential" into the statute is to create a contradiction of terms. To make the statute read, "Where the effect may be * * * to *potentially* substantially lessen competition," is to make it impossible of reasonable construction. A potential substantial lessening of competition is no more conceivable than a vacuum with something in it. The decision of the court was reached through the deletion of the word "substantially," for the Court said (p. 156):

> "In order to condemn the negative covenant, it is not necessary that the court should find that it will lessen competition or will tend to create a monopoly; it is enough that it may lessen competition or may tend to create a monopoly."

The court not alone eliminated "substantially," but it also eliminated the words, "in any line of commerce," which mean, if any meaning is to be given them, to some material degree.

In the Standard Dictionary, Twentieth Century Edition, (p. 577), "effect" is defined as "The result or product of some event, cause or agency; and consequences and outcome." It has also been the subject of judicial construction. It is defined in 14 *Cyc.* as "A result which follows a given act." Citing *Movench* v. *Young*, 16 Daly (N. Y.), 143, 144; and *Roberts* v. *Donnell*, 31 N. Y., 446, 449. Just how a contract could result in a potential lessening of competition, substantial or otherwise, or in the creation of a potential monopoly, is quite inconceivable.

Under the New York anti-trust statute in which the expression "may be" is found the words used

being "whereby a monopoly * * * *is or may be* created," or whereby "competition * * * *is* or *may be restrained*" (Section 340, General Business Law, McKinneys Consolidated Laws of New York, Book 19, p. 183), contracts like the one in suit have invariably been held not to violate the statute. The words "tend to lessen" competition are found in the South Carolina statute. These statutes and other with similar provisions will be examined later (*infra*, p. 71 *et seq.*).

None has been construed as the Court below construes them.

Relying upon the intent thus ascribed to the Committees by reason of the reports referred to, the majority placed the accentuation on the "may" and gave to the words "*may* be" the concept ot potentiality or possibility without relation to actual existence or being. The court construed the words to mean "may *by any possibility* be." Congress undoubtedly knew that the effect of some contracts may be and of others may *not* be to lessen competition or tend to create a monopoly. The history of the legislation which resulted in the final enactment demonstrates clearly that the intention of Congress was to give to each word its proper meaning, so that together they would be construed so as to place full value on the word "effect" and upon the phrases "substantially lessen competition" and "tend to create a monopoly."

In its effort to make its determination conform to the conceived legislative intent, the court failed to apply the rule that a statute in derogation of the common law must be strictly construed, and gave no effect to the distinctions to which its attention was directed, between a sale of goods unqualified by any condition except that the purchaser shall

not deal in the goods of a competitor of the seller, to which the statute applies, and a sale of an interest in goods limited in extent and duration, to which the statute, on its face, does not apply; between a condition that the purchaser shall not deal in the goods of a competitor of the seller, to which the statute applies, and a limitation of the use of particular premises, to which it does not apply; and the distinction between a prohibition affecting a "line of commerce", and a restriction affecting a particular store.

In the same manner the court, following the supposed intent of Congress, deemed it entirely unnecessary that the effect of the contract should be limited to the supposed benefit or detriment to *either of the parties to the contract*, but apparently was influenced in its decision not alone by the number of agencies which " a holding company controlling it" is supposed to have (p. 156) without a scintilla of evidence that the "holding company" had even a single agency, and seemed further influenced by the theoretical possibility that if the *plaintiff* could not acquire a monopoly, *"some other aggressive concern,* * * *, will shortly have almost, if not quite, all the pattern business"; and that to "limit to a single pattern maker the pattern business of dealers most resorted to" (of which the evidence is quite to the contrary) *"may tend* to facilitate further combinations" (p. 156). Such speculation is impotent in the face of the evidence in this case.

As is shown by the history of the legislation, the intent thus ascribed by the court to Congress, if it ever existed, was changed so far as the Clayton Act is concerned. Reliance upon the Reports of Committees addressed to such pro-

posed legislation, in interpreting a statute so as to invalidate 50,000 or more contracts, contrary to the express language of the statute is, we submit, reversible error.

The statute is not ambiguous, and there appears no need to refer to Committee reports to ascertain its intent or meaning; but if it were helpful that reports be resorted to, they should be those of the Conference Committee which dealt with Act as passed, and not those of the Judiciary Committees, which dealt with measures rejected. The Conference Reports show that the legislation proposed in Section 4 as proposed by the House and proposed to be amended by the Senate was radically changed as part of the Clayton Act, because the subject matter was more fairly and efficiently dealt with in the Federal Trade Commission Act, passed while the Clayton bill was pending (*Infra*, pp. 97, 99, 100).

The final scheme thus enacted was not intended to reach any tying contract, not unfair in its essence, which did not actually tend to substantially lessen competition through the several States or did not actually tend to create a monopoly in a line of commerce through the several States; "hypothetical or unreal" possibilities were not aimed at.

In this connection the comments of Judge Brown (p. 160) with respect to the history of the act are singularly applicable.

Under Section 3, as adopted, no lease, sale or contract for sale was made unlawful *per se*, and no lease, sale or contract for sale made unlawful independent of its effect.

VI.

The correct interpretation to be placed on Section 3 requires that due effect be given the last clause and that "a business contract be not upset upon hypothetical and unreal possibilities if it would be good upon the facts as they are."

We think the correct rule of interpretation is that employed by Judge Brown (pp. 157, 158) from which we excerpt the following passages:

> "Full weight must be given to the final clause of Section 3 of the Clayton Act:
>
> **" 'Where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce.'**
>
> "In determining the effect we must consider the thing upon which the effect is to be produced. This clause seems to require that the interpretation and application of Section 3 of the Clayton Act should be according to the principles stated in the opinion of Mr. Justice Brandeis in Chicago Board of Trade *v.* United State, 246 U. S., 231, 238; * * *
>
> "To predict the consequences of the defendant's agreement not to sell or permit to be sold on its premises, during the term of the contract, any other make of patterns, it is necessary to consider the peculiarities of the particular business to which the contract relates. We must also consider that the restraint is upon the use of the premises of the defendant for a limited period. See 251 Fed., 559, 560. It is evident that a restriction of this character did not constitute an inducement to the defendant to enter into the contract for carrying a stock of the plaintiff's goods."

And page 159:

> "A business contract, like a statute, is not to be upset 'upon hypothetical and unreal possibilities if it would be good upon the facts as they are.' *Pullman* v. *Knott*, 235 U. S., 23.
>
> "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of 'possibility' arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a 'dangerous probability.'
>
> "In the present case there is no evidence that any competitor of the plaintiff had ever been excluded from competition in the City of Boston or elsewhere because of inability to procure customers or a store in which he might market his goods. If the defendant desired to defend upon the ground that this contract, by reason of its effect upon the trade, was illegal, it was incumbent upon it to allege and prove such facts as would enable the Court to make a reasonable prediction of consequences. *Ford Motor Co.* v. *Benjamin E. Boone, Inc.*, 244 Fed., 335, 342. No such defense is made by the answer * * * (p. 160). I am of the opinion that this Court should not upon this record, and upon so incomplete a state of proofs, determine the invalidity of this contract * * * (p. 162). I can see no ground in the record for apprehension that anybody is likely to acquire a monopoly in the dress pattern business, in which, as the evidence shows, the competition is very active."

Under these principles the statute would not apply to the contract in suit because there was no evidence of tendency to restrain competition or to create a monopoly.

The statute is applicable only to such a transac-

tion as comes squarely within all its terms, and such as would constitute an absolute sale in the absence of the condition that the purchaser shall not deal in the goods of a competitor of the seller. It does not apply where the relation between the parties is other than that of mere vendor and vendee; nor where the sale is of an interest in the goods as distinguished from the sale of the goods themselves; nor where the risk of sale is substantially borne by the seller; nor where the seller's profit depends upon the sale by the dealer of the goods; nor where the parties have a joint interest in the goods; nor where the transaction is one of joint adventure; nor does it apply except where the condition of the sale is that the purchaser shall not deal in the goods of the competitor; nor where the restriction leaves the purchaser free to deal in competitor's goods in any place other than a particular store; nor where the lessening of competition, if any, is not substantial; nor where the tendency to lessen competition or to create a monopoly is merely possible; nor where the practical operation of the contract—the "effect" as it is termed in the statute—for a period of thirty years has not been to lessen competition, substantially or otherwise, or to create a monopoly incipient or otherwise. So assuming that the contract in suit is one of sale, within the meaning of the act, it is not within its condemnation.

VII.

Applying the rule to the case at bar it must appear that there is a reasonable probability that the effect may be to substantially lessen competition or tend to create a monopoly and it is not sufficient that there are "hypothetical and unreal possibilities" that the effect may be to substantially lessen competition or tend to create a monopoly.

The only facts appearing in evidence which could be claimed to bear in any way upon the question of monopoly were the facts concerning the ownership by the holding company of the shares of stock of the plaintiff, the Butterick Publishing Co., and the New Idea Co., and the fact that the three companies together have about 20,000 agents in the United States out of a total of 52,000 pattern agencies (p 106).

It is not claimed by the Court nor can it reasonably be claimed that the number of pattern agencies in existence, or the distribution of them among the plaintiff and its competitors is in any sense one of the results or effects of the plaintiff's contracts, or the condition therein that the defendant shall not sell or permit to be sold on its premises during the term of the contract any other make of patterns, or one of the effects of such contracts generally. Unless such is shown to have been one of the effects of the contract, the number of agencies and/or the distribution of them cannot be considered as facts in any way tending to prove that the effect of the contract is or may be to substantially lessen competition or to tend to create a monopoly. On the other hand the number and distribution of the agencies is testimony compe-

tent to prove and proves conclusively that such has not been the effect in the past.

But as has been pointed out, there was no evidence that this relationship between the companies, which has existed for nearly twenty years (p. 107), had restrained competition even as between themselves. On the contrary, it appeared that the business of the three companies has been and is carried on entirely separately and that there are no agreements between them (p. 83). There was no evidence that the ownership of the stock by the holding company has resulted, either with or without the aid of these exclusive agency contracts, in any suppression of competition or tended to create a monopoly, or that there *might* be any such result or tendency. On the contrary, it appeared that various new competing companies have been organized during this period and have acquired a large share of the business, that competition has grown more and more severe, and that the McCall Co., which induced the defendant to break its contract with the plaintiff is the largest company of all (pp. 40-43). In fact, as aganist the 20,000 agencies of the plaintiff and the Butterick Publishing Co., and the New Idea Co., the other competing companies have succeeded in securing 32,000. Legitimate business reasons for the existence of the exclusive clause in agency contracts are to be found in the nature of the patterns and the pattern business and were shown by evidence not contradicted. Yet Judge Johnson and the majority of the Court of Appeals struck down this particular contract, not by reference to any evidence of an illegal tendency, for there was none, but merely because of the holding company and speculative theories as to what might happen if certain imagined conditions

should arise whereas the true rule is thus stated by Judge Brown (p. 159):

> "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of 'possibility' arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a 'dangerous probability.'"

The grounds of Judge Johnson's decision were thus stated by him (pp. 16, 17):

> "The contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers: a large retail dry goods store at the corner of Temple Place and Washington Street, in the centre of the dry goods district of a large city.
>
> * * * * * * *
>
> "If the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry goods stores in this district, it would have a complete monopoly of the sale of patterns, in it, and there is nothing in the contract to prevent it doing this, or even covering the whole State of Massachusetts or the whole country. If there were but one dry goods store in a village and the plaintiff could make this contract with the proprietor of that store, it would secure a practical monoply of the pattern business in that village."

It thus appears that the decision is really based on the fact that by this contract the plaintiff established a monopoly in the defendant's store and that a complete monopoly would result *if* the plaintiff could make similar contracts with all other stores.

To the same effect is the conclusion stated by the

majority of the Circuit Court of Appeals as follows (p 156):

> "On this record we are constrained to find that this restriction may substantially lessen competition and may tend to create a monopoly. It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company, controlling it and two other pattern companies, control approximately two-fifths. The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.
>
> "We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances, we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition or may tend to create a monopoly,—or both,—and is therefore obnoxious to the Clayton Act."

It does not appear what "facts peculiar to the business" were in the minds of the court, nor what is meant by "conditions already achieved under such restraint." Nothing appeared in evidence with reference to the character of the business except

the facts above referred to (pp. 18-20), which have made it of advantage to manufacturer, dealer and public that the dealer should handle only one make of patterns and which led to the almost universal custom of the business by which the dealer is so limited. As to the "conditions already achieved under such restraint," there was no evidence whatever, as has been pointed out, that this method of doing business has had any effect in lessening competition or preventing new companies from entering into the field or that it has caused any pattern company to have difficulty either in Boston or anywhere else in establishing a proper agency. All of the other pattern companies except the Butterick Publishing Co., have begun business since the plaintiff, and have established their thirty-two thousand agencies in the face of the plaintiff's exclusive contracts.

The suggestion in the majority opinion (p. 156) that there must be hundreds, perhaps thousands, of small communities in which such an absolute monopoly might be effected is purely fanciful, as it did not appear in the testimony that any pattern company has ever established or could possibly afford to establish an agency in any community so small as to have only one store. As there are, according to the census of 1910, over 132,000 cities, town and villages in the United States, it is obvious that not many of the plaintiff's 6,000 agencies are likely to be located in villages of only one store. It must be borne in mind, too, that in this case the question is not as to the validity of a contract with a dealer in a small town or of any other "hypothetical" agency contract that might be made *but as to the validity of this particular contract between the plaintiff and the defendant under the*

actual conditions existing in Boston and in the trade.

If it were a fact that the plaintiff had a contract with the only merchant in a community, with this negative covenant in it, and therefore a monopoly of the pattern business in that community, such fact would have no relevancy or bearing on the question as to whether this particular contract in Boston substantially lessened competition or tended to create a monoply.

It is submitted that Judge Johnson and the majority of the Court of Appeals did not proceed in accordance wtih the principles stated by Mr. Justice Brandeis in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238:

> "The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular

> remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

In the present case the courts below did not consider at all the uncontroverted facts revealed by the history of the business, with respect to the growth of new companies, the increase of competition and the absence of monopolistic profits under the regime of contracts like this; nor did they consider the reasons furnished by the nature of the business for the conclusion that these contracts are advantageous to all parties, including the public, and that self interest will preclude a manufacturer from seeking to monopolize the possible agents in a given locality. No consideration whatever was given to the actual conditions existing in Boston at the time of the making of this particular contract or at the time of its breach. Those conditions were such that obviously the contract between the plaintiff and the defendant *cannot* have had any effect upon competition. When the defendant broke its contract, the plaintiff had one other agency contract in Boston, that with the R. H. White Co., in which it had agreed that it would not establish any other agency within a quarter of a mile of the White store, except that with the defendant (pp. 39, 75). The territory thus delimited covers the "shopping district" of Boston (p. 39), and includes "everybody that competed in the trade" (p. 75). Wholly apart from this, any effort on the part of the plaintiff to take steps in the direction of monopolizing trade in Boston would have been met

at the outset with the obstacle that all the other available stores had existing contracts with other pattern companies (pp. 43, 45, 80).

It does not appear that there is any reasonable probability that the effect of the contract here may be to substantially lessen competition or tend to create a monopoly and it does appear as a fact that in the past its effect has been not to lessen competition or tend to create a monopoly but to foster competition and to prevent a monopoly.

From Mr. Scanlon's testimony it is plain that the effect of the negative covenant is rather to increase and encourage competition than to lessen it. Obviously, where each pattern company is represented in a community by a single agent who is bound to conserve the best interests of that particular manufacturer, competition will be keener than if each dealer handled one or more patterns. Mr. Scanlon explained in a town of 10,000 or less a stock containing two sizes was all that could be profitably maintained, and that only *one* agency could be profitably maintained in the town. If the demands of a community would warrant keeping a larger stock, it is evident that the public would be better served, more patterns sold and less returned, if the number of sizes in the stock were increased than if the dealer put in stocks of two or more different manufacturers. Since commercial possibilities limit the number of agencies in practically all the places in which an agency could be maintained at all, the establishment of one agency by a manufacturer frees all the other dealers to handle the patterns of competitors. Thus the actual effect of the restrictive covenant is exactly the opposite of what the Court held it *may* be.

The evidence shows that twelve pattern companies had agencies in Boston and its suburbs and that all the principal companies, except the Peerless, had one or more agencies in prominent stores in the retail district of Boston (91-93). There is no evidence whatever that any pattern manufacturer has ever had difficulty in establishing a proper agency in Boston, or, indeed, anywhere in the country, or that as a matter of fact there has *anywhere* been any lessening of competition or monopolization of the business.

The question presented upon this record is whether, because of the use of the word "may" in the last clause of Section 3, Congress intended the Courts to strike down any contract which might, in some imagined state of affairs, tend to monopoly, without any evidence that that state of affairs had ever existed or was likely to arise and without any consideration of the nature of the business, the purpose of the particular contract, its effect in the past and the reasonable probabilities as to its effect in the future.

Judge Brown in his dissenting opinion (p. 160) answers this question in the negative. It is submitted that the views expressed by him are sound.

VIII.

Assuming that plaintiff's contract is a contract for sale of goods within the meaning of Section 3 of the Clayton Act, it is not within the condemnation of the act because it is not made on condition that the purchaser thereof shall not deal in the goods of plaintiff's competitor.

The provision of the contract which was held to be in contravention of the Clayton Act is as follows (p. 130):

> "Second party also agrees * * * not to sell or permit to be sold on the premises of the second party, during the term of this contract, any other make of patterns. * * *"

The provision of the Act, so far as material, is a general provision, as follows:

> "Section 3.—That it shall be unlawful * * * to make a contract for sale of goods * * * for resale * * * on the condition * * * that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect may be," etc.

The premises are the defendant's store in the City of Boston (p. 130), at Washington Street and Temple Place (p. 131).

The contract does not contain a condition that the defendant shall not deal in the goods of competitors; the provision is that the second party (the defendant) shall not sell or permit the goods of competitors to be sold *in its store* during the term of the contract. This is not a prohibition of the sale of competitor's goods by the defendant, but

is simply a restriction upon the use of the defendant's premises for a limited time.

The provision, therefore, is not within the purview of the statute.

This distinction however was fully appreciated by the whole Court in the *per curiam* opinion, dated June 28, 1918, by Dodge, Bingham & Brown, JJ., for the opinion states (p. 140):

> "While the covenant forbids the defendant 'to sell or permit to be sold' on its premises, patterns other than the plaintiff's, it does not prevent the defendant from selling elsewhere."

That the court below understood that the clause in the plaintiff's contract was a restriction against the use of the defendant's premises and not a prohibition against the defendant selling the goods of competitors, would appear from the fact that nowhere throughout the second opinion, except in quotations from the act itself, is there any reference to the prohibition in the statute against the sale of competitor's goods, but invariably the covenant in the contract is referred to as a "restriction" (pp. 153, once; 155, once; 156, three times) and when not referred to as a restriction, it is referred to as a "negative covenant" or a "restraint."

After the reargument the opinion of the majority in holding the contract invalid under the Clayton Act apparently gave no weight to this distinction, but Judge Brown, dissenting from the majority, held that this distinction should be borne in mind in determining whether the Clayton Act was applicable or not, for he said (p. 158).

> "We must also consider that the restraint is upon the use of the premises of the defendant for a limited period. See 251 Fed., 559, 560."

This had reference to the prior decision.

That it was the intention of Congress to make this distinction between a restriction upon the purchaser dealing in the goods of competitors and a general prohibition against the handling of goods of competitors appears from the amendments made in the several bills in the course of their presentation to the Senate and House of Representatives. (See History, *infra*, p. 94.)

The restriction in plaintiff's contract is in the nature of a restriction in the lease of the premises of the defendant for the purpose of exhibiting and selling to the public the plaintiff's patterns and goes no further.

The defendant, without breaking the contract, could sell the patterns of competitors just across the street or anywhere else except upon the premises mentioned in the contract.

This is certainly not a condition that the defendant "shall not use or deal in" the patterns of plaintiff's competitors.

IX.

The contract in this case is not within the Clayton Act and is a contract of agency or, if not one of strict agency, one of joint adventure in which each party has an interest in the conduct of the business and the restrictive provisions in it are regulatory of the business to be conducted under it and necessary for the protection of both parties.

If the object of the contract was in substance to establish a local agency for the sale of the plaintiff's product, section 3 of the statute has no application. This is conceded by every one.

The reports of the judiciary committee on the Clayton Bill, above referred to support this view. (See History, *infra*, pp. 89, 90.)

In fact, the House expressly refused to incorporate in the House section a provision which would make Section 4 apply to the appointment of agents for the sale of goods. (See History, *infra*, p. 91.)

From these reports, which had reference to the section in its earlier forms, it is obvious that Congress was aiming at contracts of a different nature from the present. The kind of contract which it meant to make criminal were contracts of sale under which the vendee acquired the absolute ownership of the goods sold and was in no sense the local agent of the manufacturer. If this was the intention of Congress with reference to the original bill it is plain that the milder provision actually enacted was not intended to have a broader application.

It is submitted that the contract in question created a local agency for the sale of the plaintiff's product and that in spite of the fact that a limited interest in the patterns passed to the agent the contract was not one of sale within the meaning of section 3. The contract is in substance one for the rendering of service to the plaintiff, not for the sale of goods to the defendant. The only use which the defendant could make of the patterns was to sell them to the public or return them to the plaintiff. The defendant was subjected to the control of the plaintiff, so far as the pattern business was concerned, in a variety of ways. Thus it was bound to give the pattern department a prominent position on the ground floor of its store and not to remove the department from its original loca-

tion. It was further bound to purchase for free distribution specified quantities of the plaintiff's advertising publications, to pay proper attentions to the sale of the patterns, to reorder all patterns that were sold, to conserve the best interests of the agency at all times, not to sell the patterns except at label prices and to permit the plaintiff's representative to take account of the stock whenever it desired. Twice a year the defendant had the privilege of returning discarded patterns at nine-tenths of their cost and upon the termination of the agreement it was bound to return all patterns remaining on hand for which it was to receive credit at three-fourths of their cost. All these provisions, coupled with the provision with reference to the "standing credit" to be maintained throughout the period of the contract, show that the contract was intended in good faith to create a local agency for the sale of the plaintiff's patterns and that it is not in any sense properly described as a "contract for sale of goods" within section 3.

The agreement not to handle other kinds of patterns was required of the defendant, not as a condition of the sale of goods to it, but as a condition of its appointment as one of the plaintiff's local respresentatives. It was a condition under which the plaintiff kept a stock of $1000. worth of patterns in the defendant's hands at all times during the continuance of the contract and took them back at its termination. Without entering into the contract at all it could have bought from the plaintiff all the patterns it wanted and the purchases would have been subject to no conditions whatever.

That the present contract is one of agency (as it was held to be in *Weiboldt* v. *Standard Fashion*

Co., 80 Ill., App. 67) would seem to be conclusively established by the decision in *Willcox & Gibbs Sewing Machine Co.* v. *Ewing*, 141 U. S., 647. Judge Brown recognized the authority of this decision and refers to the "long established trade usage of describing such contracts as agency contracts irrespective of the fact that the title to the goods may pass from vendor to vendee" (p. 161).

While the majority opinion stated that the present case is "easily distinguishable from the Wilcox & Gibbs case" (p. 152), no intimation is given as to the grounds of the distinction. Judge Anderson merely proceeds to say:

> "Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers."

Without pausing to criticise the use of the expression "full title" as applied to the patterns in this case, it is enough to say that Judge Anderson's language fits exactly the situation which existed in the Willcox & Gibbs case, and there seems to be no material difference between that case and this. The contract there provided that the manufacturer would "sell" its sewing machines to the dealer; that if the connection should cease the manufacturer should "have the right to *buy* back of its goods *sold* to" the dealer such as it might select; and that the dealer should "purchase" from the manufacturer a certain amount of goods until 1875. A more absolute title thus passed to the dealer than in the present case, for there was imposed upon the manufacturer no such obligation as exists here to take back its unsold goods at the termination of the

agency, yet the court held that Ewing was "strictly" an agent of the company.

With minor changes the contract between the plaintiff and the defendant could have been so worded as to reserve in the plaintiff the entire title until the sale of the patterns by the defendant instead of a reversionary interest contingent upon the failure of the defendant to sell the patterns. In that event the effect of the contract upon competition would have been identical with its effect in its present form, yet admittedly it would not have fallen within the Act. It cannot be assumed that Congress intended to make this immaterial feature the test and stamp the one form of contract with disapproval and not the other.

If a contract between a pattern manufacturer and a dealer, or a similar contract in any other branch of trade, establishes what is in effect a bona fide local agency for the sale of the manufacturer's product, it is wholly legitimate for the agent to agree not to handle competing goods, and the validity of the transaction under the Clayton Act cannot turn on the chance incident that, technically, a qualified title to the goods, limited both in extent and duration, is vested in the agent.

The contract in the Wilcox & Gibbs case very much resembles that in the case at bar except that the principal there did not have the direct interest in the business of the agent under the contract that it has here. The Wilcox & Gibbs Company had appointed Ewing its "exclusive vendor" for its sewing machines in a certain territory and had agreed, among other things, to "sell" him its sewing machines at sixty per cent. discount from its retail price list. It was also agreed that

at the termination of the contract the Wilcox & Gibbs Company should have the right to "buy" back such of the machines as it should select. There were various other provisions similar to those in the contract in this case, but the case was not as strong as this case—the Willcox & Gibbs Company was not bound to take back any of the unsold goods, and if taken back they would presumably be saleable, while in the case at bar the patterns when taken back can only be used as waste paper (p. 28). The question before the Court in the Wilcox & Gibbs case was whether the contract was one of agency which the principal could terminate or a contract of sale as was contended by Ewing. It was held that Ewing was an agent. On this point the Court said:

> "There was some discussion at the bar as to whether Ewing was, strictly, an agent of the Company. We think he was. He was none the less an agent because of his appointment as 'exclusive vendor' of the defendant's machines within a particular territory, or because of the peculiar privileges granted to or the peculiar restrictions imposed upon him. * * * The agreement constituted him the sole agent of the company for the sale of its machines within a certain territory. It is true that the machines he undertook to sell were to be purchased by him from the company at a large discount. But he could not sell them by retail below the regular retail prices. This arrangement was the mode adopted to protect the company's interests, and to secure the plaintiff such compensation for his services as would induce him to devote his time, attention and abilities to the company's interest. He was still a mere agent to sell such machines as might be delivered to him under the contract.'

If the Wilcox arrangement was an agency con-

tract as distinguished from a contract of sale there can be no question that the contract in this case is an agency contract. There are important differences, however, between the two contracts for the purposes of the application of the Clayton Act. In that case the principal assumed no responsibility for the sale of its sewing machines by the agent and had no direct interest in the results of the agent's business under the contract except as it might result in the sale by it *to* the agent of more sewing machines. In this case the plaintiff assumes practically all of the risks of the business to be conducted under the agency by its agreement to take back at ninety per cent. from time to time, during the term of the contract, practically all patterns which the agent has had on hand for six months and has been unable to sell and to replace them with other and up to date patterns at a nominal cost to the agent, and by the obligation which it assumes to take back at the end of the term of the agency all patterns on hand and unsold and to return to the agent seventy-five per cent. of their net value. The plaintiff not only agreed to so take back the patterns remaining on hand at the close of the agency, but the defendant is positively required to return them. By these provisions it is obvious that the major part at least of the risks of the business under the contract is assumed by the plaintiff.

It will be found that every restriction which is imposed upon the defendant by the terms of the contract is one which has direct relation to the protection of the plaintiff against the liability which it assumes under the contract or to the protection of the joint interests of the defendant and plaintiff in the business which is conducted under the contract.

That the passing of the title to the goods which the agent is to sell is not the test of agency is conclusively established by the *Wilcox & Gibbs Sewing Machine Company* case, though the courts below apparently regarded it as the only test.

In the present case it will be noted while a limited interest passes to the agent in the so-called sales which are made under the agreement, it passes for the purposes of the agency only, and the agent can do nothing with the patterns without violating the terms of the agreement except to place them in the location specified in the agreement and offer them for sale to the public upon the terms prescribed in the agreement, or return them to the plaintiff in case they are not sold.

The business for which the agency is created is *selling patterns* and it is of no consequence whether the title to the patterns to be sold passes preliminarily to the agent for the purposes of the business so long as the responsibility for the success of the business is divided between the parties and a fair share of its hazards is assumed by the principal. So in this case it is the responsibility of the plaintiff for the sale of the patterns which follows the patterns in the hands of the defendant and the liability it assumes to take back all which the agent fails to sell, and the other direct obligations it assumes to promote the sale of the patterns in the hands of the agent which gives it the right to impose conditions and to agree with the agent upon the manner in which the business shall be conducted. This is the distinguishing characteristic of both agency and joint adventure.

An illustrative case in the State courts to the same effect is *Staroske* v. *Pulitzer Publishing Co.*,

235 Mo., 67. In that case it was held that "a contract between a newspaper publisher and a carrier whereby the latter is given a route for the delivery of the newspaper to subscribers, with the privilege of purchasing copies of the newspaper for a specific price and selling the same at the subscription price, creates the relation of principal and agent."

See also

Pictorial Review Co. v. *Curtis Publishing Co.*, 255 Fed., 206.

The majority of the Circuit Court of Appeals held that the contract in question was not one of agency, and Judge Anderson suggested as the conclusive test (p. 152) the fact that obviously the Standard Fashion Company could not be held liable in tort for misrepresentation made by the Magrane Houston Company to a customer with respect to the quality of the patterns. The application of this test would have required a contrary decision by this Court in the Wilcox & Gibbs case. It may be conceded that in making a sale of a pattern to a customer the defendant was dealing with an article to which it had a qualified title and which it had an absolute right to sell whether the plaintiff desired the sale to be made or not, and that in making the sale it was not, speaking technically, the plaintiff's agent. On the other hand, the contract *did* create an agency of the kind which was held to exist in the Wilcox & Gibbs case and the relation of the parties was obviously entirely different than that of vendor and vendee.

In support of the proposition that the contract in question was one of sale and not an agency contract, Judge Anderson cites certain decisions and text writers, but it appears that none of the

authorities referred to have any real relevancy. It is not worth while to discuss them here in detail. They are summarized in Appendix B under subdivision I (*infra*, p. 102)). Attention may, however, be called at this time to the fact that the very first case cited, *Ford Motor Company* v. *Union Motor Sales Company*, 244 Fed., 156, in no way supports Judge Anderson's conclusion. In that case the Court said at page 158 with reference to the Ford Company's form of contract:

> "The plaintiff is under no obligation to take back any of the goods purchased by the dealer and it is expressly stated that the dealer licensee is in no way the legal representative or agent of the manufacturer licensor."

In the case at bar the plaintiff *was* under obligation to take back all patterns not sold by the dealer, and it is expressly stated in the agreement that the dealer is *the special agent of the plaintiff for the sale of the patterns.*

X.

The decisions of the Courts below give an effect to Section 3 of the Clayton Act which in view of the state of the law at the time of its passage Congress cannot have intended.

Before the passage of the Clayton Act contracts of this character were frequently assailed as being in restraint of trade either at ,common law or under the Sherman Act or state anti-monopoly statutes, and the view taken by the courts with practical unanimity was that they did not restrain trade. Congress knew that this had been

the generally accepted judicial opinion, and consequently there was an effort originally to enact legislation that would have made all such contracts illegal on their face. By adding the last clause of the section Congress declared that the contracts should not be bad on their face, but should be condemned only if they had a tendency toward substantial restraint of competition or monopoly. Decisions prior to the statute that *prima facie* no such effect is to be attributed to such contracts are clearly persuasive as showing that in cases under the Act there must be some substantial affirmative evidence to justify condemnation of any particular contract.

The statute must be construed in the light of common law principles and in so far as it may be found to be in derogation of the common law it must be strictly construed. The cardinal principle of the common law rule is the question of the reasonableness of the restraint which necessarily involves the question whether there was anything in the nature of the transaction or in the relationship between the parties in a particular case to make the restraint a reasonable one. In the case of a transaction involving the sale of merchandise and no relationship between the parties except that of vendor and vendee it would be difficult to find any reason for a condition prohibiting the vendee from dealing in the goods of a competitor except a purpose on the part of the vendor to avoid competition, and this is not a reason which has ever been favored by the law. On the other hand if the nature of the transaction and the relationship of the parties under it are such as to make the restriction a reasonable and proper one for the protection of an interest which

the vendor retains in the transaction it is one which the law has always favored and protected.

Construing the statute in the light of these principles we submit that there can be no question that it was not intended to apply to such contracts or transactions as those involved in the case at bar.

In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S., 165, the court had under consideration a so-called profit-sharing scheme of the Corn Products Co. by which the Company agreed to give to its customers a stipulated percentage upon the amount of the purchases made in one year, to be paid at the end of the following year provided that during such time they made all their purchases of glucose and grape sugar from the Company. The alleged illegality of a contract to this effect which the Corn Products Co. had made with the defendant was set up by the latter in defense of the action by the Corn Products Co. to recover the price of certain glucose sold the defendant. It appeared that the Corn Products Co. was a combination composed of all the manufacturers of glucose in the United States. In delivering the unanimous opinion of the court Chief Justice White said (pp. 172-173):

> "The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and a clause to the effect that the goods were bought by the Manufacturing company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

In *Cole Motor Car Co.* v. *Hurst*, 228 Fed., 280,

284 (C. C. A., 5th Circ.), the court held that a contract between a manufacturer of motor cars and a dealer was valid under the Sherman Act and under the anti-trust law of Texas, saying:

> "He [the dealer] was given the privilege of selling in certain counties, and no others, and he was restricted from selling the cars of other motor car companies in the same counties; but this method is an ordinary instrumentality by which manufacturers and others display and dispose of their goods and commodities, and make sure of payment, if they can. It is not restrictive of trade in any sense. Insurance companies, and many other occupations and trades, parcel out their territory to different agents, and make similar arrangements. That it could not defeat competition is obvious to the court. There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the perfectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements * * * There surely then has been no restraint of this trade."

When the case came before the court a second time Batts, Circuit Judge, who had not participated in the former decision said (p. 832):

> "The part [of the contract] which was claimed to be obnoxious to the Texas law appears to be a reasonable provision, almost essential to efficient marketing of the company's products."

Tillar v. *Cole Motor Car Co.*, 246 Fed., 831, 832.

See

Whitwell v. *Continental Tobacco Co.*, 125 Fed., 454 (C. C. A. 8th Circ.).

In re Green, 52 Fed., 104 (C. C. S. D. Ohio).

The validity, at least prior to the Clayton Act, of pattern agency contracts in substance identical with that involved in this case cannot be questioned. State courts of the highest repute have not hesitated to sanction the issue of injunctions restraining the local agent or dealer from selling the patterns of other manufacturers than the one to whom he was bound by contract.

Butterick Publishing Co. v. *Fisher*, 203 Mass., 122;

Standard Fashion Co. v. *Siegel Cooper Co.*, 30 App. Div., 564; 157 N. Y., 60; 44 App. Div., 121;

Butterick Publishing Co. v. *Rose*, 141 Wis., 533;

Peerless Pattern Co. v. *Gauntlett Dry Goods Co.*, 171 Mich., 158.

The validity of contracts of this character is shown by many other decisions collected in Davis' Trust Laws and Unfair Competition, (pp. 410 *et seq.*).

See

Brown v. *Rounsavell*, 78 Ill., 589;

Southern Fire Brick & Clay Co. v. *Garden City Sand Co.*, 223 Ill., 616;

Ferris v. *American Brewing Co.*, 155 Ind., 539;

J. W. Ripy & Co. v. *Art Wall Paper Mills*, 41 Okla., 20.

In the case last cited the Court said (p. 23):

"An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade.

"A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it, will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce."

That pattern agency contracts like that in the case at bar have not been regarded by the courts as being *prima facie* in restraint of trade or competition is shown by the fact that they have been sustained many times as against attacks based on the anti-monopoly statutes of different States, some of which are most sweeping in their condemnation of any agreement tending toward monopoly.

Thus in *Butterick Publishing Co.* v. *Fisher*, 203 Mass., 122, it was held that the contract of the Butterick Company, which was substantially identical with the contract of the Standard Fashion Co. now before the court, was not illegal under the provisions of R. L., c. 56, s. 1, which is as follows:

"A person, firm, corporation or association of persons, doing business in this Commonwealth, shall not make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation or association of persons;

> but the provisions of this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of goods, wares or merchandise."

Pattern agency contracts have uniformly been sustained by the New York courts, notwithstanding the provisions of Laws of 1899, c. 690, s. 1, to the effect that:

> "Every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented is hereby declared to be against public policy, illegal and void."

Attention has already been directed to the words "is or may be" (*supra*, pp. 34 *et seq*).

With reference to the similar New York statute of earlier date (Laws of 1893, c. 716), Judge Ingraham, speaking for the court in *Walsh* v. *Dwight*, 40 App. Div., 513, said (p. 517):

> "This Act did not have the effect of preventing a manufacturer from fixing the price at which his articles should be sold, or from making an agreement with those persons who acted as the jobbers or retailers of his manufactured articles that they would deal exclusively in his merchandise, or would not sell the merchandise of other persons at a

less price than that for which his product was sold."

In *Peerless Pattern Co.* v. *Gauntlett Dry Goods Co.*, 171 Mich., 158, a case involving a covenant like the present, the contract was held not to violate the provisions of Act No. 329 of the Public Acts of 1905, the first two sections of which read as follows:

> SECT. 1. "All agreements and contracts by which any person, co--partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."
>
> SECT. 2. "All combinations of persons co-partnerships or corporations made and entered into for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession or business, are hereby declared to be against public policy and illegal and void."

In *Weibolt* v. *Standard Fashion Co.*, 80 Ill. App., 67, it was held that a pattern agency contract of the Standard Fashion Co., precisely identical in the provision under consideration with the contract in the case at bar was not void as being in restraint of trade, either at common law or under the state statute relating to trusts and combinations, which makes unlawful any agreement to regulate or fix the price of any commodity or to fix or limit the amount or quantity to be sold in the State. (See Ill. Rev. Stats., sec. 269*a*.)

In *Sullivan* v. *Rime*, 35 S. Dak., 75, an action was brought to recover the price of patterns sold by plaintiff's assignor (the Home Pattern Co.) to the

defendants under an agency contract by which the defendants purchased the patterns and agreed not to offer for sale any other make of patterns. The case came up on demurrer and it was held that the demurrer was properly overruled. The Court said (p. 77):

> "The contention of appellants is that said contract, by reason of the provisions therein contained that defendants should not offer for sale any other make of patterns, is void and contrary to the provisions of c. 224, Laws of 1909, prohibiting monopolies. * * * There may be some serious question, considering the provisions of said contract as a whole, whether it is in fact an agency or a sales contract. But, as we view the case, it is not material to a determination whether it be held an agency or sales contract, as the result would be the same in either case. We are of the view that the provisions of said c. 224 have no application and were never intended to cover or include any of the questions here presented. The Home Pattern Company had the right to sell and to have sold its merchandise in this state, and had the right to procure an agent or purchaser to deal in and handle its patterns, obligated and bound by contract not to offer for sale or sell other like patterns for other parties. Whether treated as an agency or sales contract, there is nothing therein which, in the slightest degree, tends to the creation of a monopoly, or which in any manner tends to interfere with the right of any other persons to offer for sale or sell like merchandise of other makes in direct competition with the sales under the contract in question. So far as any provision of this contract is concerned, the whole world was theirs; the only limitation being that other persons handling similar patterns could not secure defendants as agents or purchasers during the continuance of the contract in question. The de-

fendants, if they purchased said merchandise outright, did not purchase the same as consumers thereof; but purchased the same for resale to consumers. Under such circumstances, we are of the view that the Home Pattern Company had the legal right to enter into a contract with defendants obligating them not to handle like patterns for other parties. There is no unlawful combination or monopolistic trust in such transaction, and this wholly regardless of whether or not such patterns were patented or copyrighted."

The same result has often been reached in cases involving similar contracts concerning other articles than patterns.

See, for example:

Walter A. Wood, etc., Co. v. *Greenwood Hardware Co.*, 75 S. C., 378;

Staroske v. *Pulitzer Publishing Co.*, 235 Mo., 67, *supra*;

W. T. Rawleigh Med. Co. v. *Osborne*, 177 Ia., 208;

Rose v. *Gordon*, 158 Wis., 414.

In the first of these cases the plaintiff sued for the price of certain mowers, rakes, etc., sold under a contract which provided that the defendant would not "accept the agency for, or sell, any other mower, hayrake," etc. "during the term of this contract." The defendant contended that the contract was invalid under the following statute (Code of Laws of South Carolina of 1902, Vol. 1, Sec. 2845):

"All arrangements, contracts, agreements, trusts or combinations between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition in the impor-

> tation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons as individuals, firms, corporations, syndicates or associations, that may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premiums or prices or seeks to control in any way or manner such tariff, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void."

The court held that the contract was valid, saying (p. 385):

> "It is one of those minor contracts in partial restraint of plaintiff's right to freely sell and the defendant's right to freely buy which the common law would hold to be reasonable as a fair protection of the mutual interests of the parties, and not injurious to the public as tending to create a monopoly. * * * It is the agreement of a single independent manufacturer and a single independent dealer and not monopolistic in its tendency. The contract leaves room for the keenest competition in that community by manufacturers and dealers of similar implements. There is nothing in the complaint to show that defendant is the sole dealer in that kind of implement in that community or that the needs of the public could not be reasonably met by other dealers in similar implements."

It will be noted that the South Carolina Statute, like the Clayton Act, invalidates a contract which

"tends" to lessen competition, and consequently the decision strongly supports the plaintiff's contention in the present case.

So, in *Rose* v. *Gordon*, 158 Wis., 414, which was a bill to enjoin a breach of a covenant in a lease to sell only the plaintiff's beer, the court held that there was no violation of Section 1747e of the Statutes of Wisconsin, which invalidates every contract "in restraint of trade or commerce" and every "attempt to monopolize any part of the trade or commerce in this state." The Court said (p. 416):

> "The restraint of trade resulting from the agreement being partial only and not operating to the prejudice of the public by unduly restricting competition, the contract is not an illegal contract in restraint of trade within the provisions of Sec. 1747e, Stats."

The foregoing decisions show the state of the law at the time of the passage of the Clayton Act. While Congress obviously intended to change the law by the enactment of Section 3, as is pointed out by Judge Anderson (p. 190), it did not intend to stamp with *prima facie* illegality contracts of this nature which had been regarded as harmless in the past, but merely to provide that they should be unlawful *if* they tended to substantially lessen competition or create a monopoly, and if the fact that they did have this tendency in any particular case were fairly proved by a preponderance of evidence.

XI.

Such decisions as have been made under Section 3 of the Clayton Act sustain the plaintiff's position.

Notwithstanding the great importance of Section 3 of the Clayton Act and the multitude of exclusive trade arrangements which must be now

in effect in this country, the cases under this section which have thus far been decided by the courts have been very few.

The only cases, at least in the Federal courts, in which the effect of Section 3 has been considered, apart from the case at bar, appear to be the following:

Sperry & Hutchinson Co. v. *Fenster*, 219 Fed., 755 (D. C. E. D. N. Y.);

Elliott Machine Co. v. *Center*, 227 Fed., 124 (D. C. W. D. Mich.);

United States v. *United Shoe Machinery Co.*, 227 Fed., 507; 234 Fed., 127; 264 Fed., 138 (D. C. E. D. Mo.);

Coca Cola C. v. *J. G. Butler & Sons*, 229 Fed., 224 (D. C. E. D. Ark.);

Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 235 Fed., 398 (C. C. A. 2nd Circ.);

Pictorial Review Co. v. *Curtis Publishing Co.*, 255 Fed., 206 (D. C. S. D. N. Y.).

Westinghouse Electric & Mfg. Co. v. *Diamond S. F., Co.*, 268 Fed., 121.

Although the section was quoted in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S., 502, 517, the court found it unnecessary to "make the application of this statute to the case at bar which the Circuit Court of Appeals made of it."

In *United States* v. *United Shoe Machinery Co., supra*, and in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co., supra* (when the latter was in the Circuit Court of Appeals), Section 3 was naturally held applicable to two of the alleged monopolies which the report of the judiciary committee upon the Clayton bill states were expressly aimed at by Section 3.

The United Shoe Machinery Co., case which in-

volves the interpretation and application of Section 3, is now pending before this Court. We therefore deem comment on it unnecessary.

In the Universal Film Mfg. Co., case, where a license agreement covering moving picture projecting machines provided that the licensee should use only films manufactured by the licensor, the Court said (p. 400):

> "The testimony shows that the complainant has a monopoly under its patents of projecting machines so that, if no films not manufactured by complainant can be used upon these machines, the complainant will obtain an absolute monopoly of the film business, in spite of the fact that its patent on films has expired. If the prohibitions of the Clayton Act mean anything at all, this case falls within them, and the restrictions as to use of films other than complainant's with the projecting machines are therefore void."

The facts appearing in these two cases being the only cases (other than the present case) in which contracts have been held invalid under Section 3 show that there is absolutely no resemblance between the situation which the courts had before them in those cases and the situation in the present case, where there is no evidence whatever tending to show that the last clause of the section is applicable.

In the Film case the court took occasion to refer expressly to a prior case in the Southern District of New York, where Section 3 was not regarded as applicable "because that case was decided upon a demurrer to a bill upon the face of which no substantial restraint of competition or monopoly in any line of commerce appeared," although the contract upon its face was similar to the contract condemned in the Film case.

The case hitherto decided which most resembles the present case is *Pictorial Review Co.* v. *Curtis Publishing Co., supra,* where Section 3 was held not applicable to the form of contract entered into between the Curtis Publishing Co., and its district agents, providing in substance, among other things, that the district agents should not supply to newsboys or dealers any periodical other than those published by the Curtis Publishing Co., without first obtaining the approval of the latter. Under the contract the district agents were *purchasers* of the Curtis periodicals. Judge Hand points out (p. 210) that the agents were much more than mere purchasers:

> "Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in co-operation with the Curtis boys than it does an outright sale to the district agents and nothing more. At any rate it has not been established with the clearness necessary to warrant the granting of a temporary injunction, that the defendant's contract referred to causes an unreasonable restraint of trade or otherwise comes within the prohibitions of the Clayton Act."

See also *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed., 566 (C. D. S. D. N. Y., 227 Fed., 46, C. C. A., 2nd Circ.), a case under Section 2 of the Act; and *Ford Motor Co.* v. *Benj. E. Boone, Inc.*, 244 Fed., 335 (C. C. A. 9th Circ.), in which the validity of the Ford Co. uniform agency contract was sustained though without any reference to the Clayton Act.

XII.

The price maintenance clause of the contract is valid, but the question of its validity or invalidity is not material.

In the majority opinion of the Circuit Court of Appeals it is said (pp. 194-195):

> "To avoid possible misconception of this opinion, we add that we do not overlook that the contract in question also contains a stipulation to maintain resale prices. The validity of this provision is not raised by the pleadings, nor has it been discussed by counsel. Whether under the circumstances of this case such resale price stipulation is invalid, we do not decide."

The only evidence relating to this stipulation was the testimony of the plaintiff's president with reference to the reason for having this clause in the contracts:

He said (p. 39):

> "It has been a custom in the business ever since I have been connected with it to make contracts with the merchants, and as a matter of business we make them to cover a term of years, so that we won't have to be at the expense of sending agents around to them every year or two to get them to renew their contracts, and those contracts also renew themselves, to bring about what we consider a proper economic administration of the business. Now, a merchant signing that contract, as we see it, is entitled to expect to make a profit on the business during the time that he carries it on. If the merchant were threatened with competition from other merchants, in the neighboring town or in the neighboring

> square, perhaps, in the sale of the same patterns at prices other than those at which he himself is required to sell them, he could not do business at a profit; he could not compete with price-cutting in the next block or in the next community. Now, in undertaking to take a contract with us for a term of years, it is only ordinary prudence on his part to require that he be protected in securing from the public a fixed price; and we fix the price largely in view of those considerations."

No attempt is being made in the present case to enforce this clause, and it is immaterial whether it is valid or not.

It is submitted, however, that it is valid and that there is nothing in *Boston Store* v. *American Graphophone Co.*, 246 U. S., 8, or the earlier cases, to the contrary. In those cases the court was dealing with attempts on the part of manufacturers to control the prices at which their products should be sold by purchasers who had bought the goods from the manufacturers and had paid for them and acquired a complete title.

The present case is distinguishable on two grounds, first, because the plaintiff and defendant are jointly interested in the conduct of the business, and, secondly, because the defendant's title to the patterns was only a qualified one.

By the contract now before the court the plaintiff does not undertake to control the prices which members of the public may charge for its patterns, but only the prices which its local representatives shall charge. The local representative is not a purchaser of the patterns in the sense of having acquired complete indefeasible title. He has only a qualified title giving him the right to sell to others, but if he does not sell he must return the patterns to the plaintiff. The plaintiff has a re-

versionary interest until the sale of the patterns to the public and until such sale its interest is not divested. It has a right to protect this interest by requiring its agent to maintain retail prices, and there is nothing in the decisions inconsistent with the existence of this right.

In none of the price restriction cases cited by the Court below (p. 157) was the Court called upon to consider a contract under which the manufacturer retained any interest in the property or in which the sale was not an absolute one.

At the end of the majority opinion (p. 157), there are cited a number of authorities which it is suggested, have some bearing upon the question whether either the negative covenant or the resale price stipulation or both, if invalid taint the whole contract. None of these cases appears to have any relevancy to any issue in this case. They will be examined in Appendix B, section II (*infra*, p. 105).

XIII.

Although the time for an injunction has expired, the plaintiff is entitled to relief in equity.

This was conceded in the opinion of the majority of the Circuit Court of Appeals unless the contract were deemed to be invalid under the Clayton Act.

The right of a pattern manufacturer to an injunction restraining the local dealer from violating its agreement not to handle the patterns of other makers is thoroughly established.

Butterick Publishing Co. v. *Fisher*, 203 Mass., 122;

Standard Fashion Co. v. *Siegel Cooper Co.*, 157 N. Y., 60;
Butterick Publishing Co. v. *Rose*, 141 Wis., 533;
Peerless Pattern Co. v. *Gauntlett Dry Goods Co.*, 171 Mich., 158.

Judge Brown's criticism of *Lumley* v. *Wagner* (p. 199) is belated, as the doctrine that a court of equity will enjoin the breach of a negative covenant in a contract under proper circumstances, although it cannot specifically enforce the performance of the affirmative provisions, is now thoroughly settled in the law. It is as well settled in the Federal courts as anywhere.

Singer Machine Co. v. *Union Buttonhole Co.*, Fed. Cas. No. 12904 (C. C. Mass.).
Goddard v. *Wilde*, 17 Fed., 845 (C. C. R. I.);
Chicago & A. Ry. Co. v. *N. Y., L. E. & W. R. Co.*, 24 Fed., 516 (C. C. S. D. N. Y.);
Harrison v. *Glucose Sugar Refining Co.*, 116 Fed., 304 (C. C. A. 7th Circ.);
General Electric Co. v. *Westinghouse Elec. Co.*, 151 Fed., 664 (C. C. N. D. N. Y.);
Texas Co. v. *Central Fuel Oil Co.*, 194 Fed., 1, 22 (C. C. A. 8th Circ.);
Reece Folding Machine Co. v. *Earl & Wilson*, 205 Fed., 539 (D. C. N. D. N. Y.);
Montgomery Light Water & Power Co. v. *Montgomery Traction Co.*, 219 Fed., 963 (D. C. Ala.);
In re Consumers' Albany Brewing Co., 224 Fed., 235 (D. C. N. D. N. Y.);
Automobile Insurance Co. v. *Guaranty*

Securities Corp., 240 Fed., 222 (D. C. S. D. N. Y.).

In *Javierre* v. *Central Altagracia*, 217 U. S., 502, referred to by Judge Brown, the contract contained no negative covenant, and, in addition, there was an adequate remedy at law.

In the present case, during the pendency of the litigation, to wit, on Feb. 25, 1919, the plaintiff's right to an injunction expired by the termination of the contract period (Op. C. of A., p. 189). This did not, however, terminate the plaintiff's right to relief in equity by way of the assessment of damages and the Circuit Court of Appeals so ruled, citing as authority various decisions of this court (p. 189).

It is submitted that the decision of the Court of Appeals upon this point is correct, and that, notwithstandinging the fact that the plaintiff cannot have an injunction, it is entitled to have the validity of the contract determined and the case sent back for an assessment of such portion of its damages as it can prove.

Conclusion.

This court is not asked to reverse the decisions below on questions of fact arising upon conflicting evidence, for there were no such questions. The facts were not in dispute. The sole question was whether they showed that this contract fell within the prohibitions of section 3 of the Clayton Act, or whether on the other hand no violation of that section was shown. Assuming the contract to be one of sale, the question now is in its essence simply this: Is the last clause of the Clayton Act to be

given any effect, or are contracts containing a restrictive clause of the sort described to be condemned upon their face without reference to the surrounding circumstances?

We submit that the court below was in error in the whole theory of interpretation of the statute and its application, and that the decree of the Circuit Court of Appeals of the First Circuit should be reversed, and the case remanded with such directions as this Court may deem proper.

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APPENDIX. A.

HISTORY OF SECTION 3 OF THE CLAYTON ACT.

The history of the Clayton Act shows that the method of dealing with the evils aimed at was changed from a general condemnation of all contracts prohibiting dealing in the goods of a competitor to a provision making only those contracts invalid the effect of the condition in which may be to substantially lessen competition or tend to create a monopoly.

Considered broadly the scheme of legislation embodied in the original draft of Section 4 of the Clayton Bill, the subject matter of which is now found in Section 3, as enacted: (1) declared all lease and sales on the condition prescribed unlawful *per se;* (2) prevented the abuse of so-called "tying contracts" by prohibiting their use; (3) provided for the enforcement of its provisions through the courts; and (4) declared the act of making such leases or sales criminal and prescribed punishment therefor.

The Senate scheme, as originally recommended, and later withdrawn, was substantially the same, except for the elimination of the criminal feature, and the inclusion of "contracts for sale."

Each of these features was eliminated in the Act as finally adopted.

Section 3 as enacted(1) does not declare any lease, sale or contract for sale unlawful *per se;* (2) does not prohibit use to abolish abuse; (3) provides for the enforcement of its provisions by the Federal Trade Commission; (4) does not declare any lease, sale or contract for sale criminal; and

(5) makes the lawfulness or unlawfullness of a lease, sale of contract with the prescribed tying clause dependent upon the effect.

The abandonment was of the plan to cope with the evils, or the legislative scheme, and not of the object of the legislation. The Clayton bill as first reported was a consolidation of numerous measures intended to deal with trust and monopolies. During the debates some of its subject matter was incorporated in the Federal Trade Commission Act. The matter referred to in the Judiciary Committees reports as to Section 4 was included in that incorporated in the latter Act, except where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Nothing of that character appeared in the original drafts.

The Clayton Bill (House Bill No. 15,657) was reported by the Committee on the Judiciary in the House on May 6, 1914 (House Report No. 627, 63rd Cong., 2nd Sess., Cong. Rec., Vol. 51, Part 8, p. 8201.) This report is not printed in the Congressional Record. Section 4 of the bill so reported is printed as a footnote:.[1]

It was of this section of the proposed bill, and not of Section 3 as enacted, that the language quoted from the House Committee report in the opinion

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[1]Sec. 4.—"That any person engaged in commerce who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or by both, in the discretion of the Court."

of Judge Anderson (Rec., pp. 154, 155) was used.

Even in this drastic form the report made it clear that the bill was not intended to apply to agencies, for the portion quoted by Judge Anderson (*id.*, pp. 154, 155) was preceded by the introduction (H. Rept., No. 627, pp. 10, 11), printed as a footnote.[2]

In the Report (pp. 10-13) the House Committee stated the evils, or supposed evils, which it was undertaking to declare criminal. It stated that the character of the practices sought to be interdicted were those of the United Shoe Machinery Company, the American Tobacco Company and the General Film Company.

There was no attempt, even in the most drastic form of the bill, to deal with agencies where the risk of sale was assumed primarily by the manufacturer, nor was it intended, as the quotation plainly shows, to affect any scheme of agency, whether one in which the agent paid for the goods or not, whereby the agent so-called had the privilege to return all unsold goods to the manufacturer, and under which the agent was obligated to return all unsold goods.

In the House Report it was said in favor of the bill (p. 7):

"Nothing essential has been disturbed, noth-

[2]"Section 4 of this bill has apparently been much misunderstood, and great confusion seems to have arisen in regard to its provisions. Whether designedly or from a misunderstanding of its purport, we know not, but it has been contended very earnestly that its provisions prevent exclusive or sole agencies. It not only does not prohibit or forbid exclusive agencies, but, on the contrary, it in no way whatever relates to agencies properly so termed. Let us, therefore, consider what this section really accomplishes. It prohibits the exclusive or 'tying' contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor."

> ing torn up by the roots, no parts rent asunder which can be left in wholesale combination. * * * The bill is not designed to destroy or hinder business, but, on the contrary, to help business and the whole people of the country who are related to or affected by it."

The House Report (p. 12) makes it plain that it only intended to prohibit tying contracts where the loss on sale falls on the dealer, for it says:

> "The customer having once gone to another dealer or procured the desired commodity through a mail order house may not return (the goods purchased) to his local dealer *and the goods purchased under an exclusive or 'tying' contract may remain on the shelves of the local merchant unsold.* The local dealer has invested his money in them; he has paid for them; they belong to him." (Italics ours.)

That language of course is not applicable to the contract in suit where, if the goods are unsold the defendant not alone may but is bound to return them to the manufacturer.

Accompanying the House Committee Report were three separate minority reports, marked respectively Part 2, Part 3 and Part 4, which opposed Section 4 as proposed on the ground, among others, that "it wipes out the long-established agency system of doing business."

The views expressed in the minority reports are of importance in assisting in reaching a proper interpretation of the Clayton Act, as enacted, because the objections to the bill reported by the majority as above expressed, so far as Section 4 was concerned, were all met in the amended scheme of legislation finally adopted, and the business practices described in the minority reports were not made unlawful unless their effect was substantially to lessen competition or tend to create a monoply.

Mr. Morgan, of Oklahoma, being of the opinion that Section 4 as proposed by the Committee did *not* affect selling agencies, proposed an amendment

by which selling agencies should be made unlawful by inserting the words "or appoint an agent to sell," so that the section as amended would read:

> "Sec. 4.—Any person engaged in commerce who shall make a sale or appoint an agent to sell goods, wares," etc., "shall be deemed guilty of a misdemeanor," etc. (Cong. Rec., 63rd Cong., 2nd Sess., Part 10, p. 9410).

This amendment was rejected (*id.*, p. 9411).

The importance of Mr. Morgan's proposed amendment is that the House rejected the proposal to make the bill definitely prohibit a contract by which any person should appoint an agent to sell goods, as distinguished from an agent selling the goods of a principal.

The bill was passed by the House with Section 4 as reported by the Committee, except that the word "agreement" had been inserted by amendment after the word "condition," so that the section would read, "On the condition, agreement or understanding," etc. That amendment was accepted by the Committee when suggested.

The bill (H. R. No. 15,657) then went to the Senate and was referred to the Senate Committee on the Judiciary, which, on July 22, 1914, reported the section to the Senate (Sen. Rept. No. 698, 63rd Cong., 2nd Sess., p. 56, Cong. Rec., 63rd Cong., 2nd Sess., Part 13, p. 12,469) in a different form.[6]

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[6]"Sec. 4.—That it shall be unlawful for any person engaged in commerce to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or, discount from, or rebate upon such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller."

And on the Section as thus reported the Senate Committee Report (p. 44) explained that the change was made because the Federal Trade Commission Act had been passed.[7]

Attention is here directed to the word "prohibition" used in the report, the significance of which will be hereinafter emphasized.

It was with respect to the entire legislative scheme reflected in the House bill as passed and the amendments proposed by the Committees, and not with respect to the special section now under consideration, that the Senate Committee used the language quoted by Judge Anderson on page 154 of the record. This was the same language as was relied on by Judge Johnson in the District Court (Rec., p. 15).

While the Senate Committee, in Report No. 698, recommended the amendment of Section 4 in the language quoted, when the bill was read in the Senate Mr. Culberson, the Chairman of the Committee, made the announcement that since the re-

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[7] "Sec. 4.—This section relates to exclusive and tying contracts. The first Senate amendment to the section changes the form of the declaration of substantive law by denouncing the acts as unlawful, instead of declaring, as in the House bill, that persons committing the acts shall be deemed guilty of misdemeanors, subject to the penalties prescribed. Following the course marked out in Section 2, and for the same reason, the penalties provided in Section 4 are stricken out and the enforcement of the section confided to the Federal Trade Commission by Section 9b. It is believed Section 4 is strengthened by the proposed Senate amendments to add 'contracts for sale' to leases and sales denounced by the House provision, and to make the prohibition applicable whether the articles leased, sold or contracted to be sold are 'patented or unpatented.'"

port had been printed, the Senate had passed the Federal Trade Commission act, which rendered unnecessary the adoption of Sections 2, 3 or 4 either in the form passed by the House or in the form recommended by the Senate Committee in the printed report, and that the committee, therefore, by vote resolved to recommend to the Senate that Sections 2, 3 and 4 of the bill be eliminated (*id.*, p. 13,849). The Senate accordingly rejected Section 4 in its entirety (*id.*, p. 13,849).

The rejection of Section 4 showed a complete change by the Senate Committee and the Senate itself of the method of dealing with the evils aimed at by Section 4 either in the form passed by the House or suggested by the Committee's proposed amendment.

The reason for the change, as stated by Mr. Culberson, was that the matters intended to be regulated by Section 4 could now be regulated more vigorously by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, which gave the Commission power to deal with all acts of unfair competition.

The fact that the Section had been abandoned, seem not to have been as fully weighed by the majority as by Judge Brown (Rec., p. 160).

There was no attempt on the part of the Senate to deal thereafter with any part of the subject matter of Section 4 in any way, until toward the end of the debate, when the attention of the Senate was called by Senator Reed to the decision of the Supreme Court in the case of Henry against A. B. Dick Company, and to the suggestion contained in the minority opinion of Chief Justice White, to the effect that the evil which the majority refused to correct might be obviated by legislation.

This suggestion prompted a motion to reconsider the rejection of Sections 2 and 4, and finally, after much discussion, resulted in the reconsideration of Section 4 (but not Section 2) and the adoption by the Senate of an amendment, in no way applicable to the contract in suit.[8]

Section 4, as proposed by the House and as proposed to be amended by the Senate Committee, also dealt with all classes of contracts described, and prescribed a complete *prohibition* of the condition that the purchaser shall not deal in the goods of a competitor. It did not deal with a limited *restriction* on the right of a purchaser to deal in such goods in a particular store, or with a *restriction upon the use of the purchaser's premises against handling goods of a competitor.*

This distinction between a prohibition and a restriction which falls short of such a prohibition, was fully appreciated by the Senate, which refused to adopt the amendment recommended by the Senate Committee, and instead adopted quite a

[8]"Sec. 4.—That it shall not be lawful to insert a condition in any contract relating to the sale or lease of or license to use any article or process protected by a patent or patents, the effect of which will be to prohibit or restrict the purchaser, lessee or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the sellor, lessor or licensor, or his nominees, or the effect of which will be to require the purchaser, lessee or licensee to acquire from the seller, lessor or licensor, or his nominees, any article or class of articles not protected by the patent; and any such condition shall be null and void as being in restraint of trade and contrary to public policy. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both, in the discretion of the Court." (Cong. Rec., 63rd Cong., 2nd Sess., Part 14, pp. 14,275, 14,276.)

different Section 4 which applied to *restrictions* as well as *prohibitions*.

So far as it may affect the case at bar, however, the important distinction to be observed is that the Senate rejected in its entirety the House scheme prohibiting leases or sales of unpatented articles upon the condition mentioned in Section 4 of the House Bill.

Again, so far as the inquiry may be material here, there was a complete abandonment of the original legislative scheme as outlined in the Committee reports.[9]

The bill was passed by the Senate (*id.*, Part 15, p. 14,610) and included the Section 4 as last given.

The House refused to concur in the Senate amendments and asked for a conference (*id.*, p. 14,737). The Senate agreed to the conference (*id.*, p. 14,718). The conference managers agreed upon a bill which was recommended in a report dated September 25th, 1914 (H. Rept. No. 1168, 63rd Cong., 2nd Sess., printed Cong Rec., Part 16, pp. 16,264-16,266).

In the interim between the reference of the Clayton Bill to the Conference Committee and the presentation of the report of the Conference Committee, Congress passed the Act to create a Federal Trade Commission (Act of September 26, 1914).

In conference Section 4 of the original bill was

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[9]Senator Walsh, who offered the amendment, said (*id.* p. 14,273):

> "When any article is not patented it is believed that practices of that character can easily be taken care of by the trade commission as unfair competition; but it is open to very serious question whether the trade commission will be able to put under the ban practices of that kind in view of the decision of the Supreme Court in the case referred to. This amendment is intended to prevent the making of contracts of that character, the idea being that the patentee is entitled to the exclusive use of his patent; but it ought not to be used to give him a monopoly of the sale of articles not patented."

entirely stricken out and the subject matter expressed in Section 4 was made Section 3, and finally agreed upon as follows:

> "Sec. 3.—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" (Cong. Rec., 63rd Cong., 2nd Sess., Part 16, p. 16,267).

Of this radical change the House Conference Report (p. 11) said:

> "Amendment No. 4: This amendment strikes out Section 4 of the original House bill, providing against lease or sale upon condition, of goods, wares, etc., with condition, agreement or understanding that the lessee or purchaser shall not use or deal in the goods, etc., of a competitor and the penalty prescribed therein. It also strikes out Section 2 as proposed by the Senate, dealing with the same subject, and the following is agreed to in conference as a substitute therefor";

and then follows Section 3 as above (*id*, p. 16,267).

This indicates a complete abandonment on the part of the House of the scheme of legislation contemplated by Section 4.

Further illustrating the abandonment of the

original scheme of legislation and the adoption of another in its place, is the explanation made of Amendment No. 50,[10] in the Report (p. 15).

The Conference Report was first taken up in the Senate. Before the conferees had an opportunity to present their reasons for the radical departure from the bill as passed by the House or as amended by the Senate, Senator Reed took the floor in opposition to the Conference Report and the explanation of the radical change was brought out during the debate when Mr. Overman, one of the conferees, said (Cong. Rec., 63rd Cong., 2nd Sess., Part 16, p. 15,828):

> "It was a common agreement of the conferees since the establishment of the Federal Trade Commission that that [meaning Sections 2 and 4 of the original bill] ought to be left to the Federal Trade Commission."

Senator Walsh (*id.*, p. 15,828) said:

> "It is perfectly well known that those two sections went out of the Clayton Bill here because of the conviction that the conditions with which they dealt in Sections 2 and 4 were already provided for and taken care of by Section 5 of the Trade Commission Bill."

Senator Walsh (*id.*, p. 16,147) also said, in explaining the intent and scope of Section 3:

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[10]Amendment No. 50.—This amendment was a new section inserted by the Senate as Section 9, which was redrafted in conference and renumbered Section 11 to conform to other changes, and vests jurisdiction in the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission to enforce the provisions of Sections 2, 3, 7 and 8 of this act. This section also contains other provisions for the enforcement of this law" (*id.* p. 16,268).

Section 11 referred to is reported in full (*id.* p. 16,265) and on pages 4, 5 and 6 of the Conference Report.

> "But it is only in cases where competition is likely to be suppressed or a monopoly eventually result that we are in anywise concerned. It is for just such conditions that this legislation is intended."

Senator Reed was one of the strongest opponents of the bill as recommended by the Conference Committee. He strenuously charged that the Conferees had violated the instruction of both Houses of Congress, particularly as far as Section 3 was concerned (Cong. Rec., 63rd Cong. 2nd Sess, Vol. 16, p. 15, 827). During the course of the debate Senator Reed pointed out the difference between the original House and Senate drafts, and called attention to the fact that Section 3 was in effect something which neither House had agreed upon (*id.* p. 15, 830).

Senator Reed said:

> "The conferees added this language:
> 'Where the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce.'
> "Before that amendment was put on it was enough to go into court and prove that a man had made a contract for the sale of an article, and in that contract specified that he should not use some other article. That was all you had to prove and the gates of the jail swung inward to receive the guilty man. But now, when you have proven the making of the contract, you have not made a case at all. You can be demurred out of court. You must go further and prove that the making of the contract may substantially lessen competition or tend to create a monopoly in that line of commerce.
> "Notice that the lessening of competition or tendency to create a monopoly in one section or city is not enough. The line of commerce

> taken as a whole must be substantially involved."

Senator Chilton, one of the conferees, answering Senator Reed (*id.*, p. 15, 997) said:

> "The United States Congress has the power, if it so desires to make it impossible for any corporation suspected of being a trust to do business, but it could not do so by a law that did not apply equally to all business, little as well as big."

and again (*id.*, p. 16,000):

> "The Senate in its wisdom decided that the Trade Commission should be the policy of the law makers. That has been settled. It was settled after one of the greatest debates ever heard on this floor."

and again (*id.*, p. 16,004):

> "The Senator knows that after the House and the Senate passed the bill the President signed a bill establishing an entirely different theory on these things and putting them into the hands of the Trade Commission."

Mr. Reed, after a lengthy debate in which he insisted that the conferees had failed in their duty, moved to recommit the bill to the conferees with instructions to restore the criminal penalties and make it conform in other respects with the original bill (*id.*, p. 16, 167), and the motion was rejected by a vote of 35 to 25 (*id.*, p. 16, 170).

In presenting the Conference Report to the House, Mr. Webb, the Chairman, said:

> "The House should consider this particular bill that we have under consideration now in connection with the Trade Commission bill and the Sherman anti-trust law, because we are

> trying to wedge in this bill and give it a place somewhere between those two measures. As you know, the Trade Commission bill was passed after this bill passed the House and before the trust bill passed the Senate" (*id.*, p. 16,273).

Mr. Floyd, also a member of the Conference Committee, pointed out that Section 4 was "stricken out entirely in the Senate" (*id.*, p. 16,317) and that the Federal Trade Commission was authorized to deal with the subject matter thereof (*id.*, p. 16,317).

The bill was finally passed in the form recommended by the Conference Committee by the Senate on October 5, 1914 (*id.*, p. 16,170), and by the House on October 8, 1914 (*id.*, p. 16,344).

It was radically different from the bill as originally proposed and discussed in the reports relied upon by the majority in the respects already noted. None of the changes were accepted until after lengthy debate, and a careful analysis of the effect of the changes.

The original House bill condemned *all* contracts of sale with "tying clauses," and made all such contracts unlawful *per se*. This was pointed out many times, notably by Senators Reed and Walsh (*id.*, pp. 15,827, 15,860, 16,116). The act as passed made such contracts unlawful only in the contingencies already noted.

The bill as passed made the unlawfulness of the contract depend upon its effect to be evidenced by a substantial lessening of competition or an actual, not potential, tendency to create a monopoly. It is not sufficient that the effect "*may be*" to lessen competition, but the lessening must be *substantial*. This was pointed out in the Senate at least thirty-six times notably by Senator Reed (pp. 15,830,

15,855, 15,856, 15,857, 15,860, 15,861, 16,045, 16,-148); by Senator Chilton (p. 16,602); by Senator Clapp (pp. 16,058, 16,059, 16,065); by Senator Sterling (pp. 16,105, 16,115, 16,116); by Senator Norris (pp. 16,047, 16,053); and by Senator Walsh (pp. 16,146, 16,148).

The unlawfulness of a contract was made to depend, not alone upon the substantial lessening of competition, but the substantial lessening must be in the line of commerce through the various states, and not in any specific place, section or community. This point was emphasized in the Senate over twenty-five times by Senator Reed (pp. 15,830, 15,587, 15,860, 15,861, 16,045, 16,057); by Senator Clapp (pp. 16,058, 16,-059); by Senator Sterling (p. 16,115); by Senator Norris (pp. 16,046, 16,047, 16,068), and by Senator Chilton (pp. 16,047, 16,048, 16,057).

In the House the same points were emphasized by Mr. Volstead (p. 16,282) and Mr. Nelson (p. 16,-324), and others.

It cannot, therefore, be said that the radical changes made in the bill were not fully understood by Congress.

The intent that the substantial lessening of competition and the tendency to create a monopoly shall apply to a "line of commerce," and not to a section or community, is shown in the fact that in Section 7, as enacted, the words used are "to restrain such commerce in any section or community." If the intent of Section 3 was to prevent substantial lessening of competition in any particular section or community, the conference committee were shown to have been competently equipped with verbiage with which to express that intent with exactness.

APPENDIX B.

Cases and text books cited on page 152 of the opinion.

Ford Motor Co. v. *Union Motor Sales Co.*, 244 Fed., 156. There was no question of agency at all in this case. The agreement was one of an absolute sale in which the risk of sale was borne entirely by the defendant. The Court therein said (p. 158):

> "* * * the case is absolute as distinguished from conditional sale not only within our decisions generally * * * but within the applicable decisions of the Supreme Court."

It will be observed that there is an intimation that if the sale had been a conditional one, instead of an absolute one, the ruling might not have applied.

Ford Motor Co. v. *Benjamin E. Boone, Inc.*, 244 Fed., 335. The opinion discussed one of the Ford uniform agency contracts in which an absolute sale of the motor cars was made to the agent and in which the agent agreed not to deal in any cars other than the Ford cars, and to sell the cars at prices fixed by the Ford Motor Company. The Court held that this was a reasonable agreement in furtherance of trade and not in restraint thereof, and in the protection of the interests of both the manufacturer and the agent.

The sections quoted from *Mechem on Agency* and *Mechem on Sales* do not in any way discuss such business arrangement as is involved in the present suit. Section 41 of the work on sales, cited by the Court, is one which distinguishes a

"contract for sale" from an "agency to buy" and holds that where there is an agency to buy the property so purchased is the property of the principal. Later, however, Mechem shows that there can be an agency to sell just as well as there can be an agency to buy. This excellent treatise of Mechem having been written prior to the time questions like those here arose, naturally does not deal with any such situation as arose in the *Willcox & Gibbs* case or as is presented by the case at bar.

The questions discussed in 2 *Corpus Juris*, 442 and 443, deal solely with the doctrine of *implied agency*, when based upon "Prior agency," "Single and Occasional Acts," "Subsequent Acts," "Dealings with Another Principal," "Acquiescence and Ratification," and "Silence and Knowledge"; and have not the slightest relevancy to any issue in the case at bar.

John H. Pray and Sons Co. v. *Appledore Land & Building Co.*, 76 N. H., 167. The defendant leased the Nunns Hotel Company (a third party) a hotel, and one of the covenants of the lease was that the Hotel Company should "put the hotel in suitable condition," etc. Later the defendant allowed the Hotel Company not exceeding $700 to enable it "to fulfill said covenant," etc. The plaintiff put the hotel in condition and sent its bill for same to the Hotel Company, which repudiated the claim. The plaintiff then sued the defendant. The Court gave judgment for the defendant on the ground that the agreement to allow the Hotel Company for the cost of the work, did not make the Hotel Company the defendant's agent.

Bendix v. *Staver Carriage Co.*, 174 Ill. App., 589, 595, was one in which the plaintiff brought an ac-

tion for damages for breach of a so-called "Agency Agreement," in which the risk of sale was wholly placed on the plaintiff. The question was presented on a motion to dismiss the complaint, upon various grounds, none material so far as the case at bar is concerned. The Municipal Court dismissed the complaint. One of the grounds for dismissal urged *by the defendant* was that the contract was not an "agency agreement" and was void because "it is a contract with an option" in violation of Section 130 of the Criminal Code. The Appellate Court dismissed that contention, but said in passing (pp. 594, 595):

> "We are disposed to agree with the contention that the contract does not create an agency. While it is true that it is entitled 'Agency Agreement,' and while it is also true that it *purports* to 'grant' to the plaintiff an exclusive right to sell defendant's motor cars in a specified territory for a specified period of time, *yet most, if not all, of the other provisions are wholly inconsistent with, and repugnant to, any theory of agency.*" (Italics ours.)

In *Wieboldt* v. *Standard Fashion Co.*, 80 Ill. App., 67, already considered, the same Court held that a contract exactly identical with the one in suit was an agency contract.

II.

Cases and rules cited by the Court below at page 157 as to whether one or both covenants, if invalid, "taint the whole contract" shown to answer the question in the negative.

The Court said (p. 157):

> "Whether the invalid negative covenant and the resale prices stipulation—either or both—taint the whole contract and all sales made in the course of the business contemplated by such contract, we do not decide."

The discussion of this question seems to us also to be immaterial, for obviously the contract in suit, whether one of absolute sale or otherwise, is not one in which under any decision cited or under the rules laid down in the text books the whole contract would be tainted, even if both stipulations were invalid.

In Massachusetts, where the contract was in part to be performed, an identical contract has been held to be valid in both respects under the Massachusetts Anti-Trust laws (*The Butterick Publishing Company* v. *Fisher*, 203 Mass, 122, *supra*).

That was a suit brought for an injunction to restrain the defendant from selling or permitting to be sold in his store any make of patterns other than Butterick Patterns during the term of the contract. The defendant demurred to the complaint upon the ground that the contract was contrary to R. L., c. 56, Section 1. The demurrer was overruled and the Supreme Judicial Court held that the contract was not invalid under the statute and issued an injunction.

Where there are other considerations in the contract, such as are present in the contract in suit, even if it were held that the negative covenant or retail price stipulation did constitute a violation of the Clayton Act, such invalidity would not taint the entire contract.

In *Parsons on Contract*, 9th Ed., page 490, the rule is laid down as follows:

> "But if one gives a good and valid consideration and another thereupon promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated; in which case the whole promise is void."

In *Pollock on Contracts*, 8th Ed., page 385; and *Wall's Pollock on Contracts*, page 484, the same rule is laid down.

In *Continental Wall Paper Co.* v. *Voight*, 212 U. S., 227, the plaintiff was a combination in restraint of trade composed of thirty manufacturers of wall paper, who controlled upwards of ninety-eight per cent. of all wall paper manufactured and sold in the several States and territories of the United States (p. 265). This Court held in substance that the fact that the plaintiff was an illegal combination in restraint of trade, would not affect the right of the plaintiff to recover for goods sold and delivered, unless the contract of sale itself was illegal.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 540, was a case where the sewer pipe company (the plaintiff below) was a member of an illegal combination in restraint of trade. The contract of sale, however, was not illegal and was not an essential part of the illegal combination, but was

wholly collateral thereto. This Court held that so long as the contract between the defendant and the combination was in itself a legal contract, the plaintiff had a right to recover.

Wilder v. *Corn Products Refining Co.*, 236 U. S., 165, was a similar case which was decided in favor of the plaintiff upon the authority of *Connolly v. Union Sewer Pipe Co.* (*supra*), and this Court held that a party cannot assert as a defense to a suit for money otherwise due under a contract, not inherently illegal, the fact that the party otherwise admittedly entitled to recover, is a member of an alleged combination under the Anti-trust Act.

In *McMullen* v. *Hoffman*, 174 U. S., 629, the plaintiff and the defendant entered into an agreement not to bid against each other for certain public work in the City of Portland, Maine, and to divide the profits upon the terms mentioned in the contract. This Court held that the whole contract was void and said (p. 670):

> "Being of the opinion that the contract proved in this case was illegal in the sense that it was fraudulent, and entered into for improper purposes, the law will leave the parties as it finds them."

Roselle v. *Beckemeir*, 134 Mo. 380, was another case in which there was no question of one illegal covenant invalidating another covenant which was legal. The case involved the disposition of certain money which had been collected in a lottery scheme, and the Court simply held that the right of the parties to the distribution of the money was not unlawful simply because the prior act of securing the money in the lottery was in itself unlawful.

Fishell v. *Gray*, 60 N. J. L. 5, was a case where the contract contained a negative covenant void as against public policy, but also other covenants which are not themselves illegal, and the Court held that "where there are several considerations, and one of them is an illegal promise to refrain from a particular business, the presence of such illegal stipulation will not illegalize the entire contract."

Rosenbaum v. *United States Credit Co.*, 65 N. J. L. 255, was a case which was parallel in facts with the last mentioned case, and in which the Court made the same decision relying on *Fishell* v. *Gray*.

Bone v. *Eklass*, 5 H. & N. 924, is a curious illustration of how courts endeavor to work out justice regardless of the illegality of provisions in a contract. The plaintiff sought to recover 426£. The defendant set up as an offset that he had advanced the plaintiff the sum of 500£ to be used by the plaintiff to bribe certain officials in the Turkish government, and alleged that the plaintiff had only used 300£ and still retained the balance of 200£. The Court held that although the transaction was a fraud on the Turkish government, and the agreement illegal, the plaintiff was not entitled to get the benefit of it, and that the defendant was entitled to offset the 200£.

Thomas v. *City of Richmond*, 12 Wall 349, was another case which involved no question of independent covenants. The State of Virginia had a statute which prohibited corporations from issuing corporation notes and prohibited its citizens from receiving the same. This Court held that inasmuch as the statute had prohibited the receiving of the notes as well as the making of them, the plaintiff was not entitled to recover.

Pullman Palace Company v. *Central Transportation Co.*, 171 U. S., 138 was based upon the ground that the lease made by the Central Transportation Co. was unlawful and void, because it was beyond the powers conferred on the company by the legislature and because it involved an abandonment by that company of its duty to the public. Notwithstanding that, however, the Pullman Company was required to account to the Central Transportation Company for the value of property delivered to it under the illegal contract.

Harriman v. *Nothern Securities Co.*, 197 U. S., 245, simply involved the question as to *how* a stockholder in the Northern Securities Company would be entitled to share in the distribution through the dissolution of the Northern Securities Company under a decree of this Court, as a monopoly.

In *Boylston* v. *O'Neil*, 121 N. E., 411, O'Neil was employed in the delivery of liquor contrary to law. A surety company had given a bond for the payment of money collected by him. The judgment was directed for the surety company upon the sole ground that since O'Neil's employment was illegal in itself, the violated bond for the performance of the illegal employment was in itself illegal, and since the plaintiff knew of the illegality as well as the defendant, the surety company could not be held liable.

None of these cases supports a claim that the entire contract is void, even if the negative covenant, and the covenant requiring the agent to sell at retail prices are illegal. Both of those provisions of the contract can be stricken out, and there still remains a substantial agreement between the parties which was violated without excuse, and for which the defendant makes no pretense to offer an excuse.

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AUTHORITIES CITED.

Cases:

Only cases referred to are the decisions of the two lower courts in the instant case. Opinion District Court unreported. See, however, Rec. 9–17. Opinion C. C. A., 259 Fed. 793; Rec. 151–162.

Statutes:

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

STANDARD FASHION COMPANY, PETITIONER,
v.
MAGRANE-HOUSTON COMPANY, RESPONDENT. } No. 20.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

UPON REARGUMENT.

INTRODUCTION.

This is the second argument of plaintiff's appeal from a judgment of the Circuit Court of Appeals for the first circuit affirming the action of the District Court for the District of Massachusetts, dismissing plaintiff's bill.

When the case was restored to the docket, the court called the matter to the attention of the Solicitor General.

Examination of the record discloses a question of general public interest with respect to the construc-

tion of section 3 of the Clayton Act (38 Stat. 731). That question is dealt with in this brief. The remaining questions suggested by the record seem to be peculiar to the particular facts. They are not, therefore, dealt with at length.

STATEMENT OF THE CASE.

The plaintiff is engaged in making and distributing paper patterns. It made a contract (plaintiff's Exhibit 7) with the defendant which was then conducting a retail dry-goods business. In this contract, defendants agreed, *inter alia*, "not to sell or permit to be sold on the premises of the second party (the defendant), during the term of this contract, any other make of patterns."

There was a breach of this negative covenant. The plaintiff brought this bill to obtain an injunction. There was a hearing in the District Court at which evidence was taken. (R. 19–139.)

In order to make clear exactly what the issues are in the present discussion it is necessary to state with some particularity what the two lower courts found and ruled.

The District Court (Johnson, circuit judge) found and ruled:

> 1. That the contract in question was still in force when the suit was brought.
>
> 2. That the contract was one of sale and not of agency.
>
> 3. That "the contract must be considered as part of a widely extended system and a conclusion reached as to the legality of the

system. There are in the United States and Canada fifty-two thousand (52,000) so-called pattern agencies and of these the plaintiff and two other companies allied with it through a common holding company control about twenty thousand (20,000), with all of whom a contract like the one we are considering is in force."

4. That under these circumstances the contract is unlawful because its effect may be to substantially lessen competition or tend to create a monopoly. (R. 9–17.)

Accordingly the bill was dismissed.

The Circuit Court of Appeals affirmed this judgment. (259 Fed. 793.) The majority opinion was written by Anderson, Circuit Judge. Bingham, Circuit Judge, concurred.

The Court of Appeals agreed with the District Court's ruling that the contract was in force when the suit was brought—although it noticed that plaintiff's right to an injunction expired February 25, 1919. It also approved Judge Johnson's ruling that the contract was not one of agency but of sale.

The court then turned to the question whether the negative covenant was invalidated by the Clayton Act. It said:

> *On this record we are constrained to find that the restriction may substantially lessen competition and may tend to create a monopoly. It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern*

> *companies control approximately two-fifths.* (Our italics.)

After some discussion of the necessary effect and tendency of this situation which it said—

> may tend to facilitate further combinations, so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business;

it concluded:

> *We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances,* we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition or may tend to create a monopoly—or both—and is therefore obnoxious to the Clayton Act. (Our italics.)

The court noticed also that the contract in question contained a stipulation to maintain resale prices. It did not decide the question whether this fact rendered the contract unenforceable in a Federal equity court, but it cited the familiar decisions of this court as to the invalidity of such provisions.

THE ISSUES.

The plaintiff (brief, p. 4) has stated the issues to be:

> 1. Whether a contract like the one under consideration is unlawful upon its face, or only

where the evidence establishes that its effect may be to lessen competition to tend to create a monopoly.

2. Whether the contract is, indeed, one of "sale" at all within the meaning of the act or a contract of agency or of joint adventure, to which the act does not apply.

3. Whether, if it be a contract of sale, the clause which limits the use of the defendants' premises without affecting its liberty of action elsewhere can possibly fall within the prohibition of the statute.

The first of these propositions can not be accepted as an issue here. The two lower courts did not decide that a contract like the one in suit is unlawful upon its face as distinguished from its being unlawful only where the evidence establishes that its effect may be to lessen competition or tend to create monopoly. As has been shown by a quotation from its opinion, the circuit court of appeals said in terms that such a restriction must be considered in the light of the facts peculiar to the business, to the conditions already achieved under such restraint as well as the nature of the restraint and its effect actual or probable. It was "viewing it thus, in the light of the surrounding circumstances" that the circuit court of appeals agreed with the district court that the negative covenant before it "may lessen competition or may tend to create a monopoly." That by "lessen" the court meant "substantially lessen" is clear from the first of the excerpts from the opinion set out above.

What may be the effect of given conditions under a given set of circumstances is a question of fact. Plaintiff's real complaint is that the two lower courts have successively resolved this question of fact against it upon evidence which it thinks insufficient. This is the criticism made by Brown, district judge, who dissented from the majority opinion while concurring in the result. He thought the state of the proof too "incomplete" to permit a reasonable judgment of the effect of this restrictive covenant. (R. 160.) But he did not lay down a different legal test from that adopted by his colleagues.

So far as there is a question of law respecting the general application of section 3 of the Clayton Act involved in this appeal it would seem to be this: Where it is found that a restrictive covenant "viewed in the light of the surrounding circumstances" may have the effect of substantially lessening competition, is the covenant forbidden by the statute, even though it has not been yet made to appear that that effect has actually been brought about?

ARGUMENT.

I.

Practically speaking, the case is moot.

The bill in this case sought an injunction against the violation of a negative covenant contained in defendant's contract with plaintiff. There was also a prayer for the award of damages. It is admitted by the plaintiff that the contract expired by limitation February 25, 1919. Any right that the plaintiff had

to an injunction expired, therefore, on that day. The plaintiff said in its brief upon its petition for rehearing, page 16:

> While it is plain that the damages resulting from the defendant's undertaking the sale of McCall patterns in its store can not possibly be estimated in their entirety, it *may be* that a *small part* of the damage can be shown. As the defendant has been selling McCall patterns for some time, there is *a bare possibility* that the plaintiff can produce evidence of *some* losses of sales of standard patterns due to the diversion of trade by the defendant to the McCall Co. (Italics ours.)

At other places in this same brief plaintiff emphasizes the difficulties before it in attempting to establish its damages (pp. 4, 5).

In the same document the plaintiff said (p. 2):

> The plaintiff brought this suit to maintain its right to conduct its business in the manner in which it has been conducted for over thirty years, its right to do so having been attacked on the ground that its agency contracts were void under the Clayton Act. It is respectfully submitted that this question concerning the effect of the Clayton Act, which is the only question of any importance in the case, should now be determined by this court in order that the case need not be brought here again and that there may be an authoritative decision concerning the legality of the methods by which the pattern business, and doubtless many other kinds of business, are being conducted throughout the country.

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The Solicitor General is informed that the defendant, appellee here, has ceased to do business and has liquidated its affairs. It has filed with the commissioner of corporations for the Commonwealth of Massachusetts, in which State it was incorporated, a request in due form that it be dissolved and in ordinary course it will be dissolved as a corporation by the incoming legislature of the Commonwealth.

It is respectfully suggested, in view of the appellant's statement as to its possibilities and expectations in the matter of proving damage to it from defendant's breach of the restrictive covenant, and of the situation with respect to the defendant which has just been stated, that there is no question affecting substantial rights of parties before this court now to be decided. What is sought is the view of the court upon an abstract question as to the legality of the business methods of the appellant.

As a matter of substance, if not of technicality, the case is a moot case.

II.

The lower court was right in its construction of the Clayton Act.

Section 3 of the Clayton Act, omitting certain words here inapplicable, is as follows:

> It shall be unlawful * * * to make a sale or contract for sale of goods * * * or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition,

> agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

In view of the reference in the opinion to the effect of the restraint, "actual or probable," it is not perfectly clear that the court below did not find that the restrictive covenant here had actually resulted in a substantial lessening of competition. Assuming, *arguendo*, that the court did not do that, it is manifest that it is wholly improper to say, as plaintiff does, that the court gave no effect whatever to the proviso with respect to the effect of the conditions forbidden. It did not hold that contracts containing such conditions were bad upon their face without reference to the surrounding circumstances. On the contrary, the court said in terms that it viewed the matter in the light of the surrounding circumstances. So viewing it, it made the specific finding that the case was within the proviso, to which, therefore, it gave full effect.

Reading the whole opinion, it appears that the court ruled that where it could see that the effect of such a condition when so viewed may be to substantially lessen competition or to tend to create a monopoly it was not necessary that it be convinced that such had been its effect or that such necessarily would be its effect.

In this construction of the statute the court was right.

The statute is drawn in simple and nontechnical language and presents no necessity for resort to expressions contained in its parliamentary history in order to resolve doubt as to the meaning of ambiguous language. This is said also by the plaintiff (Brief, p. 42.)

The language used by Congress is "where the effect may be" that described. It did not say "where the effect *is*" or "where the effect *shall* or *will be.*" Had Congress intended that the prohibition should be effective only where the limiting effect upon competition had already appeared the direct and obvious thing to do would have been to say so by using the unequivocal phraseology ready at hand. The fact that words describing a situation where the limiting effect upon competition had already appeared might so easily have been used and were not used is a circumstance of convincing weight. They were not used because that was not what Congress intended.

The explanation attempted by defendants is manifestly not sufficient. This explanation is that Congress used the words "may be" in the sense of futurity "so that the act passed in 1914 would apply to transactions at a subsequent period where at the time the effect of the transaction *would* be to substantially lessen competition or to tend to create a monopoly." (Brief, p. 35.) (Our italics.)

In the first place an act passed in 1914 which says that thereafter it "shall be unlawful" to do a certain thing applies in the future without any further language. If the Congress meant the act to apply only in cases where there *was* a "substantial lessening of competition" actually accomplished, the fact that it proposed to give its statute prospective operation like that of every statute, did not require it to refrain from using the words which would have made clear its purpose. The phrasing of the plaintiff's attempted explanation is a recognition that had that been the purpose of Congress it would have used the word "will" and not "may." It did use "may" because it meant "may" in its established meaning as an auxiliary expressing "ability, competency, or possibility" "contingency or liability; possibility or probability." (International Dictionary.)[1]

All the difficulties that plaintiff conjures up in its reference to the fancies and imaginings which it thinks are given rein by a construction which adopts the plain and primary meaning of the language chosen

[1] Other definitions:

Century Dictionary:

A. As an independent verb or as a quasi-auxiliary: (*a*) To have power, have ability, be able, can; (*b*) to indicate possibility.

B. As an auxiliary: In this use notionally identical with may in the contingent uses above in A (*b*) but serving to form the so-called compound tenses of the subjunctive or potential mode, expressing contingency in connection with purpose, etc.

Standard Dictionary: (1. To have permission); 2. To be contingently possible; (3. To be by chance); 4. To have power or ability.

Concise Oxford Dictionary: Auxiliary expressing possibility, permission, wish, uncertainty.

Oxford Dictionary: II. As an auxiliary: Expressing ability or power, objective possibility in relation to future (may=perhaps will).

by Congress disappear when the matter is looked squarely in the face.

It is true, as plaintiff says, that Congress did not accept a proposed form of the statute which would condemn such restrictions absolutely and at all events. It may very well have thought, as it came to consider the matter, that such a condemnation would produce the evils to which plaintiff refers (brief, 31), namely, make competition by a small manufacturer attempting to enter a field already occupied by a monopoly or by a very powerful economic unit more difficult.

Accordingly it adopted a saving clause admirably designed to avoid this evil while striking forcibly at the more obvious evil effect of the use of such clauses by the existing monopoly or dominant economic unit. It said to the courts, "You shall declare these conditions illegal where you can see that their operation presents a possibility of a certain kind. The possibility is not one of merely lessening competition. But you must, acting in the discharge of your judicial responsibility, see that there is a possibility of a 'substantial' lessening of competition." By so doing it completely avoided the danger to which plaintiff refers. For the use of a given condition by this new competitor entering a field already dominated by a very powerful industrial factor could not in the nature of things present a practical possibility of substantially lessening competition. The Congress thus confined the operation to the statute to the evils against which it was aimed.

It thus made it effective in preserving competition against a device of the most threatening nature. And it made the statute really useful by making it operative before the evil had happened and the competition sought to be protected had been destroyed.

Assuming that the court charged with applying the statute acts judicially and not arbitrarily there is no room here for imaginings or fancies nor for those "hypothetical and unreal possibilities" about which the plaintiff is disturbed. (Brief, 44.) The court must see that there is a definite and real possibility of a substantial lessening of competition. There is nothing intrinsically so difficult about the determination of the question whether in a certain situation disclosed to the court there is a possibility that there will result a substantial lessening of competition as to make it in any degree improper to commit that determination to a court. Nor is the kind of question one with which courts are incompetent to deal.

The inclusion of the word "substantially" in the proviso gives the proviso its character and accomplishes its purpose. By inserting it Congress wrote into the statute itself that "rule of reason" in the light of which the statute was to be applied.

What is thus seen to be true as to the construction of the statute when its language alone is considered becomes even more manifest when the parliamentary history of the legislation is taken into account. The court below sets out certain portions of this history which it regarded as convincing. The plaintiff sets out in its brief certain other portions from which it

draws a different conclusion. When the whole of the subject matter is considered it will be seen that the conclusion as to the construction of the statute which the court drew, principally from the language used, was certainly right.

The Clayton Act was drawn in response to the President's message of January 20, 1914 (Cong. Rec. vol. 51, Pt. II, p. 1163), in which the President referred to the fact that many processes which led toward monopoly were already sufficiently familiar to make definition possible and suggested to Congress that those practices should be forbidden explicitly "in such terms as will practically eliminate uncertainty."

The reports of the respective Judiciary Committees of the House of Representatives and of the Senate accompanying the introduction of the Clayton Act in those bodies are justly relied upon by the court below as throwing convincing light, if indeed anything more than the language of the statute is necessary, upon the purpose of Congress and the meaning of what it did. Since the plaintiff insists that these reports should not be used for this purpose because it contends that they were made "with respect to a proposed section of the law which was finally rejected and abandoned by both Houses" (brief, 20) it is helpful, before taking up the reports to see just what differences there are between the final form of the bill and its form when the reports in question were made regarding it. By so doing it can be determined whether the Court of Appeals

was right in saying that while debate and conference modified the legislators' views as to the best method of dealing with the evils aimed at, there was no abandonment of the main purpose expressed in the committee reports.

Below the text of the section is given as it was finally enacted. The language inserted by the conference committee is printed in italics. That inserted by the Senate is printed in small capitals. That contained in the original House bill is printed in ordinary roman.

> IT SHALL BE UNLAWFUL FOR any person engaged in commerce, *in the course of such commerce,* TO lease or make a sale OR CONTRACT FOR SALE of goods, wares, merchandise, machinery, supplies, or other commodities, WHETHER PATENTED OR UNPATENTED, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, *where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*

The court's reference to modification of the legislative view as to the best method of dealing with the evil aimed at is to the principal difference between the original draft and the form in which the statute passed. This change was made by the Senate committee. The House had made the section provide "that any person who shall lease" etc. "shall be guilty of a misdemeanor and upon conviction shall be punished." The Senate altered this by substituting for the criminal sanctions a declaration that the acts described should "be unlawful" and left the enforcement of the statute to appropriate civil process. But the acts made unlawful were described in the same language in the bill as reported to and passed by the House and in the bill as reported to the Senate. The House inserted in the committee draft the word "agreement" in the phrase "condition, agreement, or understanding." In the Senate, there were inserted the words "whether patented or unpatented" and the words "or contract for sale." These changes obviously only strengthened and broadened the bill. The change made by the conference committee was to *add* the qualification with respect to the effect of the acts. This undoubtedly limited the scope of the section. But it indicated no change in the purpose of Congress as indicated by the committee reports.

With this statement of the textual history of the bill one comes to the reports in question.

The House committee, explaining section 4 (now section 3), said:

Let us therefore consider what this section really accomplishes. It prohibits the exclusive or tying contract made between the manufacturer and the dealer by purchase or lease whereby the latter agrees, as a condition of the contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. * * * What is the motive of the manufacturer in making or entering into such exclusive contract? It is undoubtedly his purpose to drive out competition and to establish a monopoly in the sale of his commodities in that particular locality or community. * * * In this connection it is important to state that to-day, in every village and locality where there is only a single store and this exclusive or tying contract is entered into between the manufacturer and local dealer concerning any commodity, the exclusive or tying contract gives both the manufacturer and the local dealer a complete monopoly of that particular commodity in the locality or community. * * * *Where the concern making* these contracts is already great and powerful such as * * * (certain particular named corporations) the exclusive or tying contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful com-

> binations are operating under this system and practice. * * *.

The report of the Judiciary Committee of the Senate is even more striking because it contains a direct statement of the legislative purpose. The committee said:

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned * * * exclusive and tying contracts * * *.

This expression of congressional purpose shows that Congress intended the statute to become operative as a preventive before the evil had arisen. It proposed to prohibit this means of substantially lessening competition before the lessening had occurred—in its very incipiency. It was not content to order the removal of the scaffolding after the structure of monopoly had been erected by its use.

The individual expressions of opinion of particular members of the legislature are of little value in a question of this kind, but as will be seen from the quotations made in plaintiff's brief they show no abandonment or change of this purpose of the re-

sponsible committee. The Senate did come for a time to the conclusion that because of the Trade Commission bill the section was unnecessary. But it changed its opinion and the bill, as it came from conference, and was accepted by Senate and House, contained the section word for word as it had been reported by the Senate committee with the explanation quoted above, with the addition of the clause as to the effect of the restrictive provisions—a clause which was wholly consonant with the purpose expressed by the committee and which, indeed, gave the statute the precise effect which the Congress intended. Certainly the Congress although modifying, as above indicated, the bill as originally drawn never rejected and abandoned it in any essential detail.

If, then, resort is had to the parliamentary history of the statute, the intention of Congress manifest from the language used becomes even more plain. The court below was right.

Another thing that stands out from the report of the Senate committee is its recognition that among the things with which Congress proposed specifically to prohibit were some "which, as a rule, singly and in themselves are not covered by * * * existing antitrust acts." It intended to change the law. This intention is important in view of plaintiff's elaboration of decisions that restrictions like these had been held not to be invalid under various State antitrust statutes. Apart from the language of the committee, the enactment of so specific a pro-

hibition in the light of these decisions and other decisions that analogous restrictions were not invalid at common law or under the Sherman Act is, as the court remarked, in itself ground for an inference that the legislature intended, in the light of experience, to change the law. And the Court of Appeals well said:

> There is no answer to the suggestion of Judge Trieber in *United States* v. *United Shoe Machinery Company* (234 Fed. 127, 150), that the "presumption is, not that Congress intended that the construction of the Sherman Act should control, but, on the contrary, that it should not control * * *. Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do these acts, which may put it in his power to do so.

III.

The contract was one of sale.

Section 3 of the Clayton Act applies to leases, sales, and contracts for sale. Plaintiff contends that its contract, properly construed, is neither of these but that it merely establishes a local agency.

The court below held that as title to patterns supplied to defendant passed to it, the transaction was one of sale despite the other terms with respect to the return of unsold patterns for credit to which plaintiff calls attention.

Plaintiff somewhat overstates the effect of the provisions upon which it relies. It is true that defendant agreed to return unsold patterns upon the expiration of the contract, but the penalty for not so doing appears only to be that plaintiff is released from any obligation to redeem them.

Nor is it true that "the only use which the defendant could make of the patterns was to sell them to the public or return them to the plaintiff." (Brief, 58.) It could make any other use of them which any owner could make. It could, for instance, give them away.

The construction of this particular contract affects only this particular suit. It is not deemed necessary to expand the discussion of this point. The Court of Appeals would, however, seem to have dealt with it correctly.

IV.

The contract was on the condition forbidden by the statute.

The language was:

> Second party also agrees * * * not to sell or permit to be sold on the premises of the second party, during the term of this contract, any other make of patterns.

Plaintiff says this is not an "agreement not to deal in the goods of a competitor of the plaintiff" but is no more than "a restriction of the use" of defendant's premises "for a limited time."

Exactly what force there is in thus describing the agreement is not clear unless the contention is that if the agreement leaves to the vendee any place in which he may sell the goods of competitors of the vendor it is not within the statute. This would exclude an agreement by the vendee that he would not sell competing goods except in the island of Yap even though the vendee had never had any place of business in the island of Yap and had no intention of establishing a branch in that picturesquely named locality. It is a familiar rule of construction that a statute will not be given a meaning which will defeat its purpose and lead to absurd consequences. That rule would seem to be enough to dispose of such a contention as this.

As a matter of fact the agreement here covered the "defendant's store in Boston," the only place in which defendant was engaged in any business. It referred however to no specific premises and was broad enough to cover any premises upon which defendant had or might acquire the right to engage in the sale of patterns.

It is not plain that the words "on the premises of the second party" are not limited in their application to the phrase "permit to be sold." This would be a natural construction since they thus define the territory within which defendant's control of the action of third persons would be effective. Assuming however that defendant's agreement was "not to sell upon the premises" controlled by it, this was in express words an agreement not to deal in

the goods of others than plaintiff. This fact is neither altered nor obscured by describing the agreement as a restriction upon defendant's use of its premises. Any agreement not to deal in the goods of others, however phrased, would be to some extent "a restriction upon the use of defendant's premises." That fact would seem immaterial.

There might be an agreement not to sell competitor's patterns so limited in effect by express permission to sell outside a certain restricted area that the effect of the agreement upon competition could not be substantial. It would, however, still be an agreement not to deal in the goods of competitors and the present argument of plaintiff would fail.

CONCLUSION.

The question of fact as to the effect of the particular restrictive covenant upon competition was resolved against the plaintiff by two courts. It does not seem necessary to argue it in a brief written for the present purpose.

As to the rulings of law, the Circuit Court of Appeals was right.

JAMES M. BECK,
Solicitor General.
LA RUE BROWN,
ELIAS FIELD,
Special Assistants to the Attorney General.

JANUARY, 1922.

○

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UNITED STATES SUPREME COURT

October Term, 1919

No. 30

STANDARD FASHION COMPANY,
Petitioner,

v.

MAGRANE-HOUSTON COMPANY,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals
for the First Circuit.

Brief in Reply to that of the United States as Amicus Curiae.

ROBERT G. DODGE,
Attorney for Petitioner.

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Rogers Printing Company, 78 Sussex Street, Jersey City, N. J.

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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 20.

STANDARD FASHION COMPANY,
PETITIONER,

v.

MAGRANE-HOUSTON COMPANY,
RESPONDENT.

BRIEF IN REPLY TO THAT OF THE UNITED STATES AS AMICUS CURIAE.

Introduction.

The record of this case discloses a question of general public interest with respect to the construction of Section 3 of the Clayton Act (Solicitor General's Brief, p. 1), unless the contract in suit is construed as the plaintiff contends it should be construed, namely, as a contract of special agency or joint adventure. If plaintiff's contention is correct, this appeal does not require a construction of the Clayton Act.

The Solicitor General does not assume to discuss the particular facts of this case, but confines his brief to only some parts of the record which, as he conceives, bear upon the point in which he is interested, namely: the construction of the Clayton Act.

We think that by pursuing this method the Solicitor General has overlooked much of the record

and the inferences to be drawn therefrom as to the relationships between the parties under this contract; and while we do not intend to restate the facts here at length we will, under the points hereinafter stated, call attention to what we conceive to be those parts of the record which the Court should examine with particularity.

Points to be Discussed.

I. THE CASE IS NOT MOOT.

(a) The defendant still exists and will continue to exist for the purpose of suing and being sued and paying its debts and distributing its assets for three years after the Legislature authorizes its dissolution, which has not yet been done. (General Laws of Massachusetts, c. 155, Sec. 51).

(b) The defendant is entitled to such damages as it can prove and though the granting of an injunction now would be useless, the Court will retain the case to grant any appropriate relief (*County of Mobile* v. *Kimball*, 102 U. S., 706, 707, and other cases cited under this point).

(c) Before it can recover damages it must be decided whether the contract in question here is valid; and the decision is further required in the public interest because there are 6,000 of these contracts outstanding.

II. THE SOLICITOR GENERAL MISINTERPRETS THE DECISION OF THE COURT BELOW ON THE CONSTRUCTION OF THE CLAYTON ACT, in that

(a) That Court decided practically on the ground that within the four corners of the contract and without reference to the

evidence there had been provided means for lessening competition, irrespective of the use made of said means.

(b) The Court did not consider the undisputed evidence that there had been no lessening of competition or tendency to create a monopoly but on the contrary the system was keenly competitive, extremely advantageous to the public and in the opinion of a competent witness economical.

(c) There was no conflict in the testimony on any point, and the Court did not base its conclusion on findings of fact, or if it purported to do so it based inference on inference or presumption on presumption, which is not permissible.

III. THE CONTRACT IS NOT ONE OF SALE.

(a) But a method adopted by plaintiff without combination with any one as a reasonable one to market its goods.

(b) The provisions of the contract are reasonably adapted to this purpose, requiring the defendant at all times to conserve the best interests of the agency, to protect plaintiff's goods, to sell them only at retail and to return in bulk all that are not so sold so that out-of-date patterns will not get on the market and plaintiff's retained business as well as its reputation will not be injured.

(c) The fact that defendant was required at all times to keep a minimum amount of stock and at the end of the contract to return this minimum amount and that by reason of the exchange privilege it could not be determined until the end of the contract and the return of the unsold patterns what the plaintiff would receive for its patterns or what the defendant would pay shows that it could not have been in-

tended to sell the patterns to defendant. An unqualified title never vested in the defendant.

(d) It was intended to secure the exclusive services of defendant in selling plaintiff's patterns and to allow the sale of other makes on the same premises would interfere with defendant's giving such exclusive service; and it was not intended to injure competitors or the public and as a fact it did not as appears from the record.

IV. THE NEGATIVE COVENANT IS NOT SUCH A CONDITION AS IS PROHIBITED BY SECTION 3.

(a) Because it is specifically limited to the premises described in the contract on which defendant was to sell plaintiff's patterns, and notwithstanding it defendant if it desired could sell other makes of patterns in any other store or stores it had or might have in the same or any other city.

(b) Because the actual facts show that notwithstanding it the competition has been exceedingly keen and plaintiff's competitors have in the majority of cases come into existence during the use of such covenant by plaintiff and some of such competitors have secured a greater number of the 52,000 pattern agencies than plaintiff, one of them about twice as many.

ARGUMENT.

I.

The case is not moot.

Even if the information of the Solicitor General (Brief, p. 8) is correct, the defendant has never been dissolved. Its last certificate of condition was filed under the laws of Massachusetts in 1919. There is on file in the State House a letter dated December 31, 1920, stating that the company had wound up its affairs and ceased doing business March 27, 1920, and asking to be dissolved. No further steps have been taken towards dissolution.

> "Every corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three years after the time when it would have been so dissolved for the purpose of prosecuting and defending suits by or against it and enabling it gradually to settle and close its affairs, to dispose of and convey its property and to divide its capital stock, but not for the purpose of continuing the business for which it was established; provided, that the corporate existence of such a corporation, for the purposes of any suit brought by or against it within said period of three years, shall continue beyond said period for a further period of sixty days after final judgment in the suit." (General Laws of Massachusetts, C. 155, Sec. 151.)

We are advised that the defendant has ceased to do business as a retail drygoods house, and that it is in that sense that its affairs have been wound up. Certainly its obligations to the plaintiff have not been liquidated.

Upon the trial the defendant proved $3,798.46 damages (pp. 49, 50, 52, 53), from which would be deducted $788.73 as a credit for the unsold stock returned (p. 54).

The foregoing damages were proved as the loss resulting from the termination of the agency by the breach by the defendant of that part of its contract obligating it to continue to sell plaintiff's patterns in its store.

The quotations in the Solicitor General's brief taken from the brief of the appellant upon rehearing relate to three other kinds of damage, to wit:

> "The loss of sales outside the defendant's store which would have been induced by the distribution of plaintiff's advertising material by the defendant.
>
> "The loss of sales by the diversion of business in the defendant's store to the McCall Company.
>
> "The loss of sales by the diversion of business to the McCall Company outside the defendant's store by the distribution of *its* advertising material" (*p. 4, Appellant's Brief upon Rehearing.*)

It was of these three additional kinds of damages that the language was used which the Solicitor General quotes from page 16 of the brief for the appellant upon rehearing in the Circuit Court of Appeals (See also pp. 4 and 5, of same brief).

The quotation made by the Solicitor General from page 2 of the same brief discloses, we submit, another way of saying that there is a matter of public interest involved as well as plaintiff's particular interest in having the contract in question passed on.

If plaintiff's contract is lawful it will have a right to recover from the defendant not only the

damages shown at the trial but the classes of damages above mentioned, if they can be ascertained, and/or under the circumstances of this case we believe plaintiff can recover the profits realized by the defendant from the sale by it of the McCall patterns. These profits can now be ascertained.

With respect to *all* of these kinds of damages the plaintiff's rights are dependent upon the validity of the contract. If the arrangement entered into is unlawful the plaintiff is remediless in any Court.

It is plain that the plaintiff can make no headway at all on the question of damages until the question of the legality of the arrangement between the plaintiff and the defendant has been established. We submit nothing is clearer than that whenever relief by way of injunction becomes inappropriate because of lapse of time or by some other similar adventitious circumstances the Federal Courts will retain jurisdiction in equity for the purpose of granting any appropriate relief, though it be only the assessment of damages.

> *Beedle* v. *Bennett*, 122 U. S., 71;
> *County of Mobile* v. *Kimball*, 102 U. S., 691, 706, 707;
> *Chinnook* v. *Paterson, etc., Co.*, 112 F., 531;
> *Rose* v. *City of Fort Wayne*, 63 F., 466;
> *Van Allen* v. *N. Y. E. R. R. Co.*, 144 N. Y., 174, 179, 180.

Moreover, there are additional and important reasons which seem to the plaintiff to require a decision herein in the interest of justice.

The District Court decided this contract was unlawful within Section 3 of the Clayton Act. That

opinion is now on record unreversed, and under its terms not only this particular contract but all the thousands of similar contracts in this country are invalidated, as the District Judge did not deal with the facts of this particular case but held that the contract was upon its face monopolistic in tendency because of what might be done under contracts of this nature and thus was void under the Clayton Act (p. 16).

The Circuit Court of Appeals, we submit, made the same decision. If that decision is wrong it is most unjust that it should stand unreversed. If it is right, this Court should so determine.

Both parties to this suit are alive. The controversy between them is alive and undecided. There is no abstract question involved as between these parties. The question involved is upon existing facts and rights. We are not asking a decision in advance about a right before it has been actually asserted and contested, nor a decision upon a mere abstract question, nor a judgment which can have no practical legal effect. We are asking for a decision which is essential to guide the District Judge in the further progress of this litigation; and the fact that the question is of great public interest (Solicitor General's Brief, p. 1), is a further consideration of importance and brings the case within the principle laid down by this Court in numerous cases.

Ex Parte Steele, 162 F., 694, 701;

Boise City Irr. & Land Co. v. *Clarke*, 131 F., 415, 419;

Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S., 498, 515, 516;

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U. S. v. *Pan-American Commission*, 261 F., 229;
27 Cyc., p. 911, n., 10;
Suppl. 1901, p. 3050;
Suppl. 1914-1918, p. 2382.

We are advised that there are numerous proceedings which have been started by the Federal Trade Commission which involve this very question, and among others this very contract. Furthermore, we understand the rule to be that no equity case is moot in which a decree consistent with the pleadings and existing facts can be entered which will determine the rights of the parties to the litigation.

We submit that as a matter of substance as well as of technicality the case is not a moot case.

II.

The interpretation of the decision of the Court below upon the construction of the Clayton Act which the Solicitor General insists on is, we think, erroneous.

We think that the Court below meant what it said in stating (p. 156):

> "In order to condemn the negative covenant it is not necessary that the Court should find that it will lessen competition or will tend to create a monopoly; it is enough to find that it *may* lessen competition or *may* tend to create a monopoly." (Italics are ours.)

The District Court laid down the rule (p. 16), saying:

> "I do not think it is the duty of the Court to find this (a substantial lessening of competition), before we can pronounce a contract unlawful, etc. * * * We think, therefore, it is the duty of the Court to determine whether or not the contract has provided means for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means."

That our understanding of the decision of the Circuit Court of Appeals is correct becomes evident from the dissenting opinion of Judge Brown (p. 159):

> "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of possibility arising in ignorance of facts which if known would destroy that feeling. It must be based on knowledge and upon a reasonable belief that in view of existing facts there is a 'dangerous probability.'"

And again (p. 161):

> "I am of the opinion that on the present record we can not properly determine that the contract is invalid under the Clayton Act. The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden is upon him who asserts the illegality. The application of the statute should be made only upon full proofs."

Judge Brown having said elsewhere (p. 160) that "the invalidity of this contract" should not be determined by the Court "upon so incomplete a state

of proofs"—meaning what he had said in the preceding paragraph, "that Congress had rejected various drafts which would make a contract of this character void upon its face"—and had inserted the final clause "to prevent the disturbance that might result to long-established methods of business by an indiscriminate condemnation of a large body of existing contracts because of the verbal form, irrespective of this actual or probable effect, etc."

It is true the Court said (p. 156):

> "We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint as well as the nature of restraint and its effect actual or probable. Viewing it thus in the light of the surrounding circumstances we are constrained to agree with the District Court that the negative covenant in this contract *may* lessen competition or *may* tend to create a monopoly—or both—and is therefore obnoxious to the Clayton Act." (Italics are ours.)

The Court had been saying (p. 156):

> "It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern companies control approximately two-fifths. The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such pattern manufacturer a monopoly of business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combina-

> tions; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

It is in respect of this statement that the Court made the construction of the Clayton Act just above mentioned.

The District Court made no finding of fact, and except for the quotation just referred to the Circuit Court of Appeals made no statement of facts.

Yet none of the testimony offered by the plaintiff was contradicted, and that testimony disclosed that there had been no lessening of competition but that competition had increased and was increasing all the time, that new companies had come into existence and thriven, that the McCall Company which induced the defendant here to break its contract with the plaintiff had come into existence since the plaintiff began business and adopted this form of contract, and that it had secured twice as many agencies as the plaintiff in the many years of its existence had been able to acquire. The testimony further showed that the business under the system of contracts here in question was keenly competitive, extremely advantageous to the public and in the opinion of the witness economical.

There was no testimony showing that any deception, misrepresentation or oppression had been practised; there was no complaint of any competitor or any person at all of any unfairness or unfair methods, nor any suggestion that the public had suffered injury or that competitors had reasonable ground for complaint.

We submit that upon such a record the Court erred in reaching its conclusion upon the narrow grounds stated in its opinion, which we think we are entirely justified in saying ignored the undisputed testimony just referred to.

A tendency is an inference from proven facts, an inference from the facts is a question of law for the Court. The testimony was undisputed and the case occupies when it comes here under such circumstances the same position it would occupy had the facts been agreed upon by the parties and their agreement embodied in the record. (*United States* v. *Pugh*, 99 U. S., 265, 271.)

We submit that it is error in construing Section 3 of the Clayton Act to so construe the words "may be" as will result in imaginings in respect to possible lessenings of competition or tendencies to create monopolies, when it would seem to be plain that Congress meant to deal with the discernment and suppression of practices in the course of commerce which in connection with an accomplished sale or lease was bringing about a condition adverse to the public policy of Congress to prevent restraints of trade and establishment of monopolies whether accomplished or in their earlier stages.

The District Court decided this question upon the ground that within the four corners of the contract and without reference to the evidence there had been "provided means for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means" (p. 16); and this interpretation of Section 3 of the Clayton Act was affirmed by the Circuit Court of Appeals notwithstanding its reference to

the rule requiring consideration of the surrounding circumstances, etc.

We submit that the section did not contemplate such an interpretation because of the proviso appearing at the end thereof, particularly under circumstances such as exist in this case where the facts are in the record. For under such circumstances the Court must consider *all* the facts peculiar to the business to which the restraint is applied, its condition before and *after* the restraint was imposed, the nature of the restraint and its effect actual or probable, the history of the restraint, the evil believed to exist, the reason for the adoption of a particular remedy, and the purpose or end sought to be obtained, because they are all relevant facts. Where a record discloses the facts, a conclusion of the actual effect or tendency can be found, and from that, probabilities considered.

And we earnestly urge this construction of the Act, at the same time suggesting that this view must necessarily be correct since Section 3 of the Clayton Act would naturally be interpreted as contended for by the District Court if the proviso at the end were omitted; and by the introduction of that proviso Congress meant to deal with facts as they are and to afford an opportunity to ascertain the conditions before and after the restraint complained of.

In other words, the interpretation contended for by the Solicitor General would have been proper if the final proviso had not been inserted in the Act at all. By inserting this proviso Congress must be deemed not to have had the intent attributed to it by the Solicitor General.

We think as a rule of interpretation the lan-

guage used by this Court in *United States* v. *United States Steel Corporation*, 251 U. S., at page 444, may appropriately be called to the Court's attention at this point:

> "Our consideration should be of not what the corporation had power to do or did, but what it has power to do and is doing."

Moreover, the Solicitor General overlooks the testimony (p. 38), that the plaintiff in its sales rooms sells quite largely directly to the public without imposing any condition whatsoever on the purchasers and at the ordinary retail or label prices and in addition thereto does a very considerable mail order business. It thus appears that this contract is further distinguished from the interpretation suggested by the Solicitor General as to the Clayton Act, through this very considerable portion of the plaintiff's business conducted through its own stores and by mail.

For it is submitted that the Clayton Act is not intended to change the law in any way with respect to the rights of a manufacturer to so market his goods as will prevent the buyer of the product from using the same in competition with the business retained by the seller, of selling direct to the public where it appears, as the uncontradicted evidence here shows, that without such restriction the business of the manufacturer would suffer injury (pp. 36, 37, 38).

In *U. S.* v. *Addyston Pipe Co.*, 85 F., 271, a partial restraint of trade was said to be permissible where the provisions are reasonably necessary to prevent competition by the buyer with the business retained by the seller.

This decision was modified by this court (175

U. S., 211), but the modification had no reference to the foregoing proposition.

This proposition is cited approvingly in the *John D. Park & Sons Co.* case (153 F., 24, 42, App. dis., 212, U. S., 588), and the followning cited as typical cases:

> *American Strawboard Co.* v. *Adlemann Paper Co.*, 83 F., 619;
> *Hitchcock* v. *Anthony*, 83 F., 779;
> *Navigation Co.* v. *Winsor*, 20 Wall., 64;
> *Dunlop* v. *Gregory*, 10 N. Y., 241;
> *Hodge* v. *Sloan*, 107 N. Y., 244.

It is contended by the Solicitor General (Brief, p. 6), that the Court below based its conclusions upon findings of fact. The respect in which the Solicitor General thinks the Court founded its decision on findings of fact is that the one surrounding circumstance referred to in the opinion of the Court below, to wit: the common ownership of the stock of the plaintiff and two other companies, was the *effect* of the plaintiff's contract. There was no evidence whatever showing that this surrounding circumstance was the effect of the plaintiff's contract or contracts.

If it be assumed that the Court so found then the finding is without any evidence to support it. If, therefore, the Solicitor General is correct in the assumption that the Court found as a matter of fact based on this inference that the effect of the plaintiff's contracts may be to substantially lessen competition or tend to create a monopoly, such finding was based upon an inference based upon a prior inference. This, we submit, is an error of law. The effect of the plaintiff's contracts could have been no different if the plaintiff were the

owner of all of the stock of the three companies mentioned, nor could the effect be any different if some competitor controlled all of the 46,000 contracts other than those of the plaintiff.

We repeat, the District Court ruled that if the contract provided "means" it was immaterial whether the "means" had been or were being used, and the Court of Appeals agrees, saying, "It is enough to find that it *may* lessen competition or *may* tend to create a monopoly" (p. 156). We say that this is not enough, but that it must be shown that there is a real and substantial probability that the effect will be to substantially lessen competition or tend to create a monopoly, and not a mere possibility that these results may follow (p. 159).

We therefore respectfully submit that the Solicitor General is in error in his contention that the Court based its conclusion upon findings of fact, and that the opinion, properly understood declares the contract to be void on its face.

The statement (Solicitor General's brief p. 20) quoting the Circuit Court of Appeals, exhibits the contention that a contract which may put it in the power of the seller to lessen competition is prohibited by the Clayton Act. So far as this is based on Judge Trieber's decision (234 F., 127, 150), we may say that he has changed his views (264 F., 138, 167); for he there held certain restrictive clauses lawful because reasonable in the light of the evidence before him showing how they worked out.

We believe that with what was said in our principal brief sufficient has been said here to advise the Court of the situation in this case without taking up any further particular questions covered by the Solicitor General under this point.

III.

The contract is not one of sale.

We submit that the contract is a method for the plaintiff to market its own goods, the principal part of which it markets through contracts similar to the one here, and the balance of which it markets through its own salesrooms and through the mail (pp. 36, 38). Thus viewed, the reasons for the provisions of the contract appear to be clarified and to make unnatural the construction suggested by the Solicitor General that the defendant could give away the patterns (Brief, p. 21). The scheme of the contract requires the agent in conserving at all times the best interests of the agency to protect the plaintiffs' goods, sell them only at retail, and to return in bulk all that are not so sold, so that out-of-date patterns may not get on the market, and the plaintiff's own retained business as well as its reputation may not be injured.

While we have attempted to make clear in our principal brief that the object of establishing the agency is to sell patterns *through* the local dealer to the public, and not *to* the local dealer, it may be profitable to slightly expand what we there said by particular references to the record, in view of the suggestion of the Solicitor General that "plaintiff somewhat overstates the effect of the provisions upon which it relies" (Brief, p. 21).

The pattern business has many peculiar features, different from practically every other business. When an agency is to be established a dry-goods store is sought where piece goods and fabrics of that kind are sold; these make the most de-

sirable agencies where the customers may buy the goods for the garments that are made with the aid of Standard patterns (p. 26). An assortment of patterns consists of about 1,200 different styles (pp. 27, 38), cut at an average of about seven sizes for each style (p. 27). The amount of the stock to be placed in the agency is determined with the closest possible reference to the business of the particular agency (p. 27). The stock agreed upon between the parties in this case (p. 68) meant about 14,285 patterns. A new assortment of about 60 new styles per month was issued (p. 27). Patterns are very perishable (p. 27). Styles change very quickly (p. 27). Patterns which go out of style must be exchanged for patterns of up-to-date styles (p. 27). One cannot sell any which are out of date (p. 86). When patterns go out of style, they become worthless except as waste paper (p. 28). In order to properly conduct the business it is necessary for the agent to keep on hand a proper assortment of patterns. This means that the agent (in this case the defendant) must maintain a stock of patterns of a minimum amount.

From the very nature of the business, it is never expected that the agent shall sell to the public, (and from the terms of this contract it is plain that it was never intended that the defendant should sell to the public) all of the patterns, since he must return at the end of the agency the minimum amount of the stock of patterns which he has been obligated to maintain.

Upon the termination of the contract (p. 131) the defendant returned the entire stock for credit at 75%.

In view of these provisions it is clear that there

always must remain with the defendant the minimum amount (in this case $1,000 in value, p. 130, 131), which it was not intended should be sold either by the plaintiff to the defendant or by the defendant to the public.

The amount that the plaintiff receives and the amount that the defendant pays is ultimately determined by the proportion of the patterns returned during the period of the contract and the charges each makes in his account in respect thereto.

In other words, the exchange privilege makes it impracticable to ascertain the percentage of profit in the transaction until the contract period has been finished (pp. 64, 65).

To illustrate:—From every dollar received for patterns sold at retail, the defendant receives 50c. gross, and the plaintiff receives 50c. gross. On every dollar's worth at retail of patterns not sold but returned by the defendant during the period of the contract in exchange for new patterns the defendant contributed one-tenth of the net price, or 5c. on the dollar at retail, and on all such patterns not sold but returned, the risk of the defendant is limited to 5 per cent. of the retail price, while the balance of the risk and loss is assumed by the plaintiff.

The ultimate cost of the patterns to the defendant and the amount received by the plaintiff is not *fixed* by the discount of 50% provided in the contract. As explained by Mr. Scanlon, although the profit of the plaintiff on a 15c. pattern (charged to the defendant at 7½ cents), if sold by the defendant, would be fixed at 5½ cents per pattern (pp. 62, 64, 84), nevertheless the actual profit would be reduced by reason of the exchanges (pp.

62, 65, 84). Thus on the patterns furnished to the defendant (while it performed the contract) amounting in value to $6,109.80 net (p. 49), the plaintiff's profit was only $2,612 (p. 69) because $1,578.83 in value of these patterns were furnished in exchange (p. 49).

The reason of this may be well illustrated by taking as an example a 20c. pattern. A 20c. pattern furnished to the defendant was charged at 10c. If such pattern was not sold but returned for exchange, the defendant would be credited with 9/10ths of the price with which it was originally charged, 9c., and the agent's loss would be 1c. In such event a new pattern would be furnished to the agent, for the credit of 9c. and for the additional charge of 1c. In that way the agent would have one 20c. pattern at 11c., and the plaintiff would have furnished two 20c. patterns, for which it had charged the defendant 11c. If the same pattern was returned the second time the agent would again receive a credit of 9c. and would get a new pattern for which it would be charged 10c. As a result of this transaction the agent would have one 20c. pattern charged at 12c., and the plaintiff would have furnished three 20c. patterns for which it would have charged the defendant 12c. and so on as long as the pattern or replacing pattern might be returned. It thus appears that the cost of the patterns which are sold by the defendant and the amount received by the plaintiff for such patterns sold depends altogether upon the proportion of the patterns furnished by the plaintiff to the defendant, which the defendant sells to the public.

In such circumstances the provision of the contract by which the discount of 10% for patterns exchanged is required, and the provision that the

defendant shall give proper attention to the sale of the patterns and to conserve the best interests of the agency at all times, operate to the advantage of the defendant as well as the plaintiff. Even the discount itself tends to make it to the pecuniary interest of the defendant to endeavor to sell patterns rather than to return them. This is evidenced by the fact that if it does sell them (without exchange), it gets 50c. on the dollar at retail whereas if it does not sell them, it sustains a loss of 5c. on the dollar at retail on each return. The same clause operates to the benefit of the plaintiff, for if the agent sells the pattern instead of returning it, the cost to the plaintiff of furnishing the patterns, which are sold, is thus reduced. It is thus clear that the more patterns which are sold by the defendant to the public the less it costs the defendant, and the less it costs the plaintiff to furnish the patterns.

With a clear understanding of the operation of these provisions of the contract, the other provision that the agent shall not sell or permit to be sold on the premises any other make of patterns during the term of the contract is in furtherance of the sale of the patterns which form the subject matter of the joint adventure, and is a most reasonable one. It must of course, be obvious that if some other make of pattern were offered in the same store, the tendency would be to reduce the sale of plaintiff's patterns and thus increase the number of patterns which the defendant must return to the plaintiff either in exchange during the term of the contract or for credit at 75 per cent at the close of the contract, and thus to increase the cost to each of the parties of carrying out the joint adventure.

Such a transaction cannot be called a sale.

IV.

The contract is not on the condition forbidden by the statute.

The Solicitor General contends that the restriction upon the defendant not to sell or permit to be sold on its premises during the term of the contract any other make of patterns means something other than a restriction upon the defendant at the particular place.

The testimony shows where the premises of the defendant were, and, furthermore, the contract specifies (p. 131) where they were.

We think the language of the contract settles this question. Perhaps it may be appropriate, however, to mention the fact, of which the Court is doubtless by general information informed, that many corporations exist having stores in many cities, and many having more than one store in the same city. The fact is that such corporate merchants very frequently market one make of patterns in one store and another make in another store where they have more than one store in the same city; and, similarly, where they have stores in different cities, market one make of patterns in one city and another make or makes of patterns in other cities. This practice is in exact accordance with our understanding of the meaning of the provision of the contract referred to.

The actual facts show that notwithstanding this covenant the competition has been exceedingly keen and plaintiff's competitors have in the majority of cases come into existence during the use of such covenant by plaintiff and some of such competitors have secured a greater number of the

52,000 pattern agencies than plaintiff, one of them about twice as many.

V.

Other cases in which Section 3 has been considered.

Since the former argument in January, 1921, the following cases have been decided, each involving the interpretation and application of Section 3:

Curtis Publishing Co. v. *Federal Trade Com'n*, 270 F., 881;
The Texas Company v. *Federal Trade Com'n*, 273 F., 478;
The Standard Oil Co. v. *Federal Trade Com'n*, 273 F., 478;
The Canfield Oil Co. v. *Federal Trade Com'n*, and five other cases, 274 F., 571;
Sinclair Refining Co. v. *Federal Trade Com'n*, not yet reported.

They are now pending before this Court. We therefore deem comment on them unnecessary.

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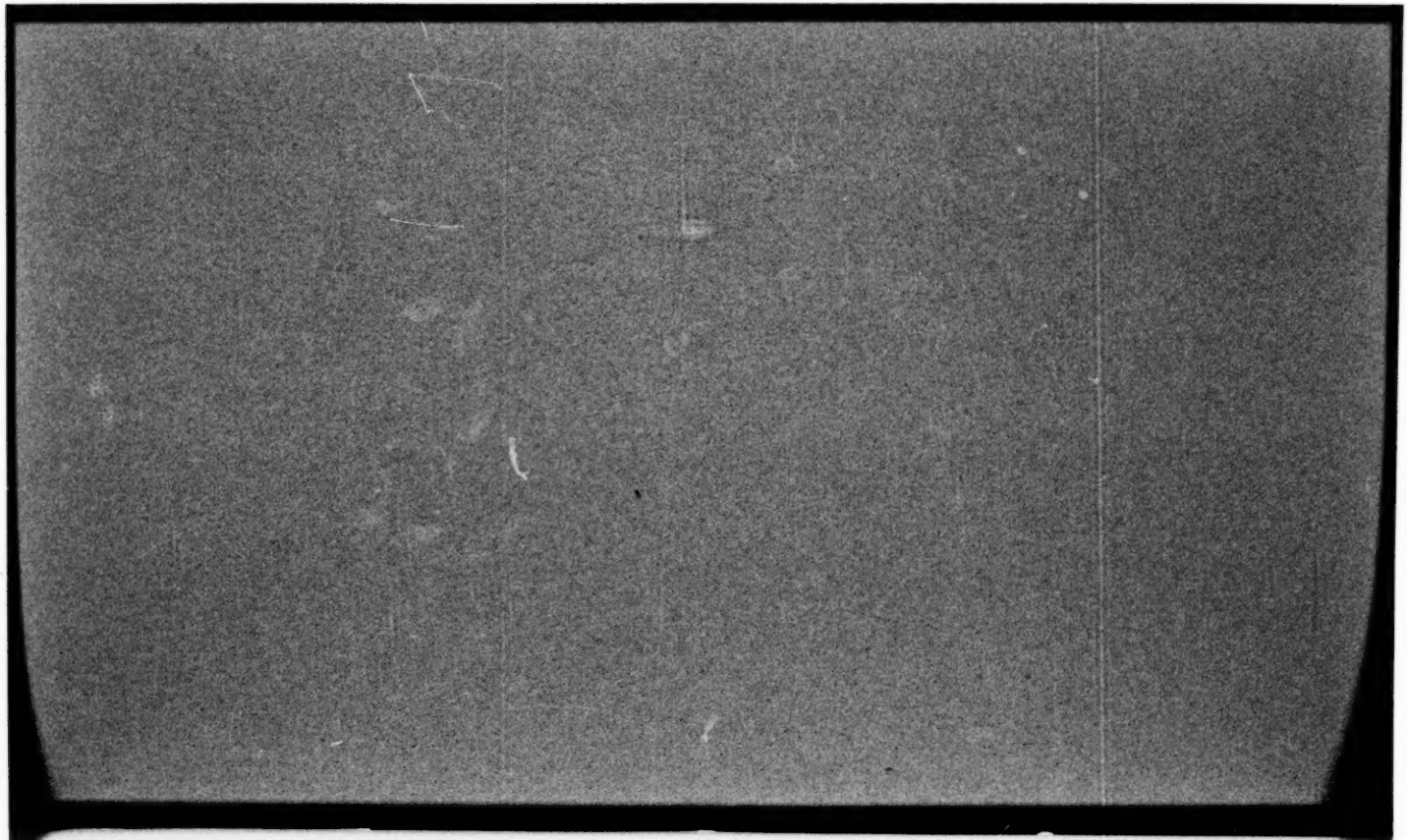

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1921.

The Standard Fashion Company, Petitioner, *vs.* Magrane-Houston Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 10, 1922.]

Mr. Justice Day delivered the opinion of the Court.

Petitioner brought suit in the United States District Court for the District of Massachusetts to restrain the respondent from violating a certain contract concerning the sale of patterns for garments worn by women and children, called standard patterns. The bill was dismissed by the District Court and its decree was affirmed by the Circuit Court of Appeals. 259 Fed. 793.

Petitioner is a New York corporation engaged in the manufacture and distribution of patterns. Respondent conducted a retail dry goods business at the corner of Washington Street and Temple Place in the city of Boston. On November 14, 1914, the parties entered into a contract by which the petitioner granted to the respondent an agency for the sale of standard patterns at respondent's store, for a term of two years from the date of the contract, and from term to term thereafter until the agreement should be terminated as thereinafter provided. Petitioner agreed to sell to respondent standard patterns at a discount of 50% from retail prices, with advertising matter and publications upon terms stated; and to allow respondent to return discarded patterns semi-annually between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost for other patterns to be shipped from time to time thereafter. The contract provided that patterns returned for exchange must have been purchased from the respondent and must be delivered in good order to the

general office of the seller in New York. Respondent agreed to purchase a substantial number of standard fashion sheets, to purchase and keep on hand at all times, except during the period of exchange, $1,000 value in standard patterns at net invoice price, and to pay petitioner for the pattern stock to be selected by it on terms of payment which are stated. Respondent agreed not to assign or transfer the agency, or to remove it from its original location without the written consent of the petitioner, and not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell standard patterns except at labelled prices. Respondent agreed to permit petitioner to take account of pattern stock whenever it desired, to pay proper attention to the sale of standard patterns, to conserve the best interests of the agency at all times, and to reorder promptly as patterns were sold. Either party desiring to terminate the agreement was required to give the other party three months' notice in writing within thirty days after the expiration of any contract period, the agency to continue during such three months. Upon expiration of such notice respondent agreed to promptly return to petitioner all standard patterns, and petitioner agreed to credit respondent for the same on receipt in good order at three-fourths cost. Neglect to return the pattern stock within two weeks after the expiration of the three months' notice to relieve the petitioner from all obligation to redeem the same. It was further stipulated that in the event the business property of the respondent, or a substantial part thereof, should be disposed of by respondent for business other than that of dry goods or as a general department store, the respondent should have the privilege of terminating the contract by giving the petitioner due notice of such change. Two weeks after the change in the premises had been made the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.

We agree with the courts below that the notices not having been given as required by the contract, the same continued in force until three months from November 25, 1918, to wit, to February 25, 1919. It is contended in the brief for the Government, filed by it as *amicus curiae*, that as the date last mentioned had elapsed pending the suit, the case has become moot, but we are unable to agree with

such contention. The bill prayed an assessment of damages as far as capable of ascertainment. The record shows that such damages were capable at least of partial ascertainment.

The suggestion that the respondent had wound up its affairs, and had gone out of business on March 27, 1920, is met by the General Laws of Massachusetts, Section 51, continuing its corporate existence for the period of three years for the purpose of prosecuting or defending suits by or against it.

The principal question in the case and the one upon which the writ of certiorari was granted involves the construction of Section 3 of the Clayton Act, 38 Stats. 731. That section, so far as pertinent here, provides:

"It shall be unlawful . . . to make a sale or contract for sale of goods . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The contract contains an agreement that the respondent shall not sell or permit to be sold on its premises during the term of the contract any other make of patterns. It is shown that on or about July 1, 1917, the respondent discontinued the sale of the petitioner's patterns and placed on sale in its store patterns of a rival company known as the McCall Company.

It is insisted by the petitioner that the contract is not one of sale, but is one of agency or joint venture, but an analysis of the contract shows that a sale was in fact intended and made. It is provided that patterns returned for exchange must have been purchased from the petitioner. Respondent agreed to purchase a certain number of patterns. Upon expiration of the notice of termination the respondent agreed to promptly return all standard patterns bought under the contract. In the event of the disposition of the business property of the respondent at Washington Street and Temple Place, the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.

Full title and dominion passed to the buyer. While this contract is denominated one of agency, it is perfectly apparent that it is one of sale. *Straus et al.* v. *Victor Talking Machine Co.*, 243 U. S. 490.

The contract required the purchaser not to deal in goods of competitors of the seller. It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force. The real question is: Does the contract of sale come within the Third Section of the Clayton Act because the covenant not to sell the patterns of others "may be to substantially lessen competition or tend to create a monopoly."

The Clayton Act, as its title and the history of its enactment discloses, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890. The latter Act had been interpreted by this Court to apply to contracts, combinations and conspiracies which unduly obstruct the free and natural flow of commerce. The construction since regarded as controlling was stated in the *Standard Oil* case, 221 U. S. 1, 58, wherein this Court construed the Act as intended to reach combinations unduly restrictive of the flow of commerce or unduly restrictive of competition. It was said that the Act embraced:

"All contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." See also *United States* v. *American Tobacco*, 221 U. S. 106; *United States* v. *St. Louis Terminal Co.*, 224 U. S. 383; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S.

20; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61; *United States* v. *Reading Company*, 226 U. S. 324; *Nash* v. *United States*, 229 U. S. 373; *Straus* v. *American Pub. Assn.*, 231 U. S. 22.

As the Sherman Act was usually administered, when a case was made out, it resulted in a decree dissolving the combination, sometimes with unsatisfactory results so far as the purpose to maintain free competition was concerned.

The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which "may substantially lessen competition or tend to create a monopoly."

Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the Act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports. See *Railroad Commission of Wisconsin et al.* v. *C. B. & Q. R. R. Co.*, decided February 27, 1922, *ante*, page —, and previous decisions of this Court therein cited.

Section Three condemns sales or agreements where the effect of such sale or contract of sale "may" be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word "may" was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial.

Both courts below found that the contract interpreted in the light of the circumstances surrounding the making of it was within the provisions of the Clayton Act as one which substantially lessened competition and tended to create monopoly. These courts put special stress upon the fact found that of 52,000 so-called pattern

agencies in the entire country, the petitioner, or its holding company controlling it and two other pattern companies, approximately controlled two-fifths of such agencies. As the Circuit Court of Appeals summarizing the matter pertinently observed:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

We agree with these conclusions, and have no doubt that the contract, properly interpreted, with its restrictive covenant, brings it fairly within the section of the Clayton Act under consideration.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.